

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

— 216 —
No. 19,725

STEWART L. UDALL, Secretary of the Interior, *Appellant*

v.

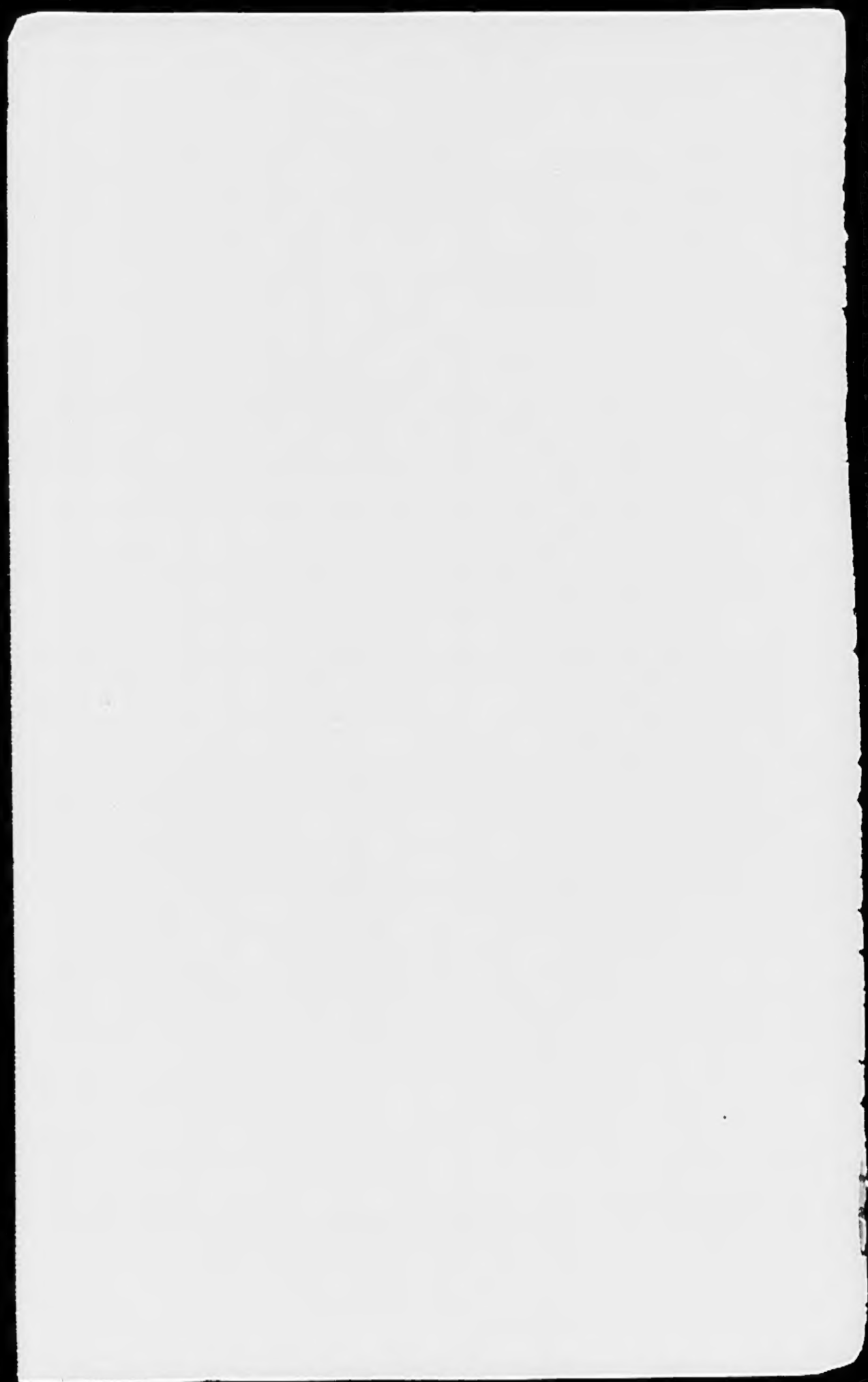
NORMAN M. LITTELL, *Appellee*

Appeal From the United States District Court
For the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

Volume III
FILED MAR 7 1966 (Pages 1024-1574)

Nathan J. Paulson
CLERK



INDEX

VOLUME III

	Vol.	Page
Amendment to "Motion for an Order Adjudicating Defendant in Contempt," to conform to the proof	III	1024
Order, filed April 6, 1964, denying plaintiff's contempt motion	III	1027
Answer, filed August 28, 1964	III	1028
Defendant's motion to clarify preliminary injunction	III	1031
Memorandum of points and authorities in support of defendant's motion to clarify preliminary injunction ..	III	1034
Plaintiff's opposition to defendant's motion to clarify preliminary injunction	III	1034
Exhibit 4, Letter to Assistant Attorney General Ramsey Clark from Frederick Bernays Wiener, dated April 9, 1964	III	1046
Exhibit 5, Letter to Frederick Bernays Wiener from Assistant Attorney General Clark, dated April 21, 1964..	III	1048
Exhibit 6, Letter to Assistant Attorney General Clark from Frederick Bernays Wiener, dated April 24, 1964	III	1049
Exhibit 7, Letter to Frederick Bernays Wiener from Assistant Attorney General Clark, dated May 7, 1964 ...	III	1050
Exhibit 8, Letter to Assistant Attorney General Clark from Frederick Bernays Wiener, dated August 31, 1964	III	1051
Exhibit 9, Letter to Frederick Bernays Wiener from Assistant Attorney General Clark, dated September 4, 1964	III	1052
Exhibit 10, Affidavit of plaintiff, together with a list of 38 retainer voucher payments and a telegram to Wauneka, Nakai and the Navajo Councilmen, dated August 23, 1964	III	1053
Exhibit 11, Affidavit of Walter L. Wolf, Jr.	III	1061

	Vol.	Page
Exhibit 12, Affidavit of Annie D. Wauneka	III	1062
Points and authorities in support of plaintiff's opposition to defendant's motion to clarify preliminary in- junction	III	1066
Defendant's response to plaintiff's opposition to motion to clarify preliminary injunction	III	1067
Order denying motion to clarify preliminary injunction ..	III	1072
Excerpts from transcript of proceedings in district court, February 1, 1965:		
Opening statement on behalf of plaintiff	III	1075
Opening statement on behalf of defendant	III	1080
Raymond Nakai:		
Direct examination	III	1117
Cross-examination	III	1125
Excerpts from transcript of proceedings in district court, February 2, 1965:		
Raymond Nakai:		
Cross-examination	III	1158
Leo Denetsone:		
Direct examination	III	1160
Cross-examination	III	1179
Examination by the court	III	1186
Genevieve Denetsone:		
Direct examination	III	1199
Cross-examination	III	1216
Redirect examination	III	1218
Recross-examination	III	1219
Milton Boyd:		
Direct examination	III	1222
Cross-examination	III	1225

Index Continued

iii

Vol. Page

Carl Todacheene:

Direct examination	III	1229
Cross-examination	III	1235

Excerpts from transcript of proceedings in district court,
February 3, 1965:

Genevieve Denetsone:

Direct examination	III	1239
Cross-examination	III	1249
Redirect examination	III	1257

Robert Young:

Direct examination	III	1258
Cross-examination	III	1274

Barry DeRose:

Direct examination	III	1281
Cross-examination	III	1310

Plaintiff:

Direct examination	III	1333
--------------------------	-----	------

Excerpts from transcript of proceedings in district court,
February 4, 1965:

Plaintiff:

Direct examination	III	1343
Cross-examination	III	1436

Excerpts from transcript of proceedings in district court,
February 5, 1965:

Plaintiff:

Cross-examination	III	1442
-------------------------	-----	------

Excerpts from transcript of proceedings in district court,
February 8, 1965:

Plaintiff:

Cross-examination	III	1489
-------------------------	-----	------



United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,338

STEWART L. UDALL, Secretary of the Interior, *Appellant*

v.

NORMAN M. LITTELL, *Appellee*

Appeal From the United States District Court
For the District of Columbia

JOINT APPENDIX

(Filed April 10, 1964)

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

NORMAN M. LITTELL, *Plaintiff*,

v.

STEWART L. UDALL, Secretary of the Interior, *Defendant*.

C.A. No. 2779-63

Amendment to "Motion for an Order Adjudicating Defendant* in Contempt***," to Conform to the Proof**

Pursuant to Rule 15, F.R. Civ. P., plaintiff amends to conform to the proof his "Motion for an Order Adjudicating Defendant and Another in Contempt for Violation of Preliminary Injunctions," as follows:

1. Amend title of motion by striking out the word "ANOTHER" and substituting the word "OTHERS."

2. Amend introductory paragraph of motion by adding, after the words "Secretary of the Interior" in line 2, the words "FRANK J. BARRY, Solicitor of the Interior Department."

3. Amend the motion by adding the following new paragraph after present paragraph 3:

"3A. Said Barry had personal knowledge of the terms of said injunction, as appears from the testimony on the hearing of the present motion."

4. Amend the motion by adding the following new paragraphs after present paragraph 5:

"5A. Officers and agents of the defendant Udall were present and did not object at another meeting of the Navajo Tribal Council on February 3, 1964, when the Chairman again ordered the plaintiff, the Tribe's General Counsel, to leave the meeting, thus indicating to the members of the Navajo Tribal Council that this ejection likewise had the sanction of the defendant Udall

and of the executive department charged by law with the supervision and guardianship of Indian affairs, including the affairs of the Navajo Tribe of Indians.

"5B. When the plaintiff thereafter sought to protect his approved contractual relationship with the Navajo Tribe of Indians from further interference on the part of the Chairman by bringing an action against the Chairman in the United States District Court for the District of Arizona, said Barry with the approval and acquiescence of the defendant Udall requested the Department of Justice to file in said cause a representation of interest on the part of the United States, to the effect that plaintiff's action against the Chairman to protect his approved contract involved an intrusion into the internal affairs of the Navajo Tribe. Said Barry with the approval and acquiescence of the defendant Udall took action as aforesaid in the face of this Court's Conclusion of Law No. 3, set forth in the preliminary injunction, to the effect that the Navajo Tribe is not a necessary party to the present action, a conclusion based on *Arkansas v. Texas*, 346 U.S. 368. Plaintiff's action against the Chairman was dismissed for lack of jurisdiction on the grounds set forth in the representation filed by the United States, a ruling which has been appealed.

"5C. The result of the foregoing acts on the part of the defendant Udall and of the said Barry and Zimmerman is that, until and unless the ruling just recited is reversed, the plaintiff has been effectually prevented from reporting to the Navajo Tribal Council, the governing body of his client the Navajo Tribe of Indians, and thus has been disabled from performing his approved contract with said Tribe.

"5D. The defendant Udall and his officers, agents, and employees have further interfered with plaintiff's performance of his approved contract with the Navajo

Tribe of Indians as their General Counsel by ignoring and by-passing and failing to communicate with him concerning pending Congressional legislation affecting said Tribe and its members and property, contrary to the uniform practice of the Department of the Interior for a period of more than 16 years.

"5E. The defendant Udall and his officers, agents, and employees have further interfered with plaintiff's performance of his approved contract with the Navajo Tribe of Indians as their General Counsel by minimizing communications with him concerning all other matters involving the interests of said Tribe and its members, thereby minimizing and downgrading in the eyes of his client his position as their General Counsel.

"5F. The defendant Udall and his officers, agents and employees, including the said Barry and the said Zimmerman, have further interfered with plaintiff's performance of his approved contract with the Navajo Tribe of Indians by formulating and repeating, in writing and orally, since the filing of the present motion, an interpretation of said contract that is utterly untenable but that effectually severs his attorney-client relationship with the Navajo Tribal Council, the governing body of his client, the Navajo Tribe of Indians.

"5G. The defendant Udall has never caused to be returned to the offices of the Navajo Tribe of Indians the files of the Tribe's Legal Department that the said Zimmerman took therefrom between November 2 and 15, 1963."

5. Amend paragraph 6 of the motion to read as follows:

"6. Hearing on this motion as originally filed having been had, plaintiff accordingly moves that the Court enter an order holding that the defendant Udall and the said Barry and Zimmerman are each in contempt

of this Court for their aforesaid violations of the terms of the preliminary injunction of November 29, 1963."

NORMAN M. LITTELL, *Plaintiff*,

By:

FREDERICK BERNAYS WIENER,
1025 Connecticut Avenue, N.W.,
Washington 36, D. C.,

JOHN F. DOYLE,

WILLIAM R. RAFFERTY,
512 Federal Bar Building,
Washington 6, D. C.,

Attorneys for the Plaintiff.

[For opinion denying plaintiff's motion for an order adjudicating defendant and others in contempt see Appendix I to Opinion, Findings of Fact and Conclusions of Law and Permanent Injunction filed May 26, 1965, *infra*.]

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

NORMAN M. LITTELL, *Plaintiff*,

v.

STEWART L. UDALL, Secretary of the Interior, *Defendant*.

Civil No. 2779-63

Filed April 6, 1964

Order

The plaintiff's motion for an order adjudicating the defendant and others in contempt for violation of the preliminary injunction entered in this Court November 29, 1963, having come on for hearing and the Court having heard and considered the evidence and the argument of counsel and considered the material filed in support of the motion and having entered an opinion containing findings of fact and

conclusions of law, and it appearing that the evidence does not establish a violation of the preliminary injunction,

WHEREFORE, it is ordered that the plaintiff's motion for an order adjudicating the defendant and others in contempt for violation of the preliminary injunction is hereby denied.

Judge
United States District Court

No objection as to form:
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

NORMAN M. LITTELL, *Plaintiff*,

v.

STEWART L. UDALL, Secretary of the Interior, *Defendant*.

Civil No. 2779-63

Filed August 28, 1964

Answer

For his first defense in answer to the complaint, the defendant respectfully shows:

I

1, 2. The allegations in paragraphs 1 and 2 of the complaint are admitted.

3. The allegations in paragraph 3 constitute conclusions of law which require no answer.

4-6. The allegations in paragraphs 4 to 6, inclusive, are admitted.

7. The defendant admits that the Tribal Council has not terminated plaintiff's contract. Defendant admits that the Tribal Council has not authorized or directed anyone to terminate the contract. Defendant admits that the Tribal Council has not proposed or authorized the suspension of

plaintiff from his duties, as alleged in paragraph 7. All of the remaining allegations in paragraph 7 which are not specifically admitted are hereby denied.

8. The defendant admits that by letter dated November 1, 1963, he informed plaintiff that the attorney's contract would be terminated, that his personal performance under the contract was suspended, that approval of the contract was rescinded and withdrawn, and that no payments were to be made under the contract until further notice. Defendant admits that he directed that the plaintiff have a full and fair opportunity to present evidence by way of explanation or exculpation, as alleged in paragraph 8. The remaining allegations in paragraph 8 which are not specifically admitted are hereby denied.

9. The defendant admits that the grounds upon which he purported to act were based upon information contained in memoranda to him from the Solicitor of the Department of the Interior, but the defendant denies that the grounds were insubstantial, unsubstantiated and demonstrably wrong, as asserted in paragraph 9. Defendant denies that the conclusions drawn by the Solicitor were unjustified, in excess of statutory authority and arbitrary and capricious.

10-14. The allegations in paragraphs 10 to 14, inclusive, are denied.

II

For his second defense in answer to the complaint, the defendant alleges:

1. The defendant, as Secretary of the Interior, has been given complete power to supervise and regulate all Indian-nonIndian relationships, except as expressly limited by Congress. That power embraces supervision of relations of attorneys with Indian tribes, including investigation of their activities, approval of contracts by attorneys and Indian tribes, and approval of vouchers for payments under such contracts.

2. Congress, by statute 25 U.S.C. 81 and 82, has confirmed the Secretary's authority in broad terms to supervise and regulate all details of attorneys' relationships with Indian tribes and authorized him to withdraw his approval and annul or terminate such contracts in the exercise of his supervisory authority.

3. In executing his duties and responsibilities as Secretary of the Interior, the defendant received information and discovered facts which indicated probable cause for the withdrawal and rescission of the approval and termination of the plaintiff's attorney contract with the Navajo Tribe.

4. The defendant, by letter to the plaintiff dated November 1, 1963, had commenced proceedings to either bring about the termination of the contract or to allow the plaintiff to show why that contract should not be terminated when the plaintiff instituted this action to enjoin the defendant from proceeding.

5. The information received and the facts which led the defendant to initiate the proceeding mentioned in paragraph 4 above involved charges of a serious nature as to the activities of the plaintiff in his relations with the Navajo Tribe and are of such a nature that the defendant, on information and belief, asserts the plaintiff is not entitled to equitable relief.

III

For his third defense in answer to the complaint, the defendant asserts that the plaintiff has not exhausted the administrative remedy available.

WHEREFORE, the defendant requests that the complaint be dismissed.

Respectfully,

HERBERT PITTLE

THOMAS L. McKEVITT

Attorneys, Department of Justice

Attorneys for Defendant

Room 2136, Department of Justice

REpublic 7-8200, extension 2712

[Filed September 11, 1964]

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

NORMAN M. LITTELL, *Plaintiff*,

v.

STEWART L. UDALL, Secretary of the Interior, *Defendant*.

Civil No. 2779-63

Defendant's Motion to Clarify Preliminary Injunction.

The defendant, Stewart L. Udall, moves for entry of an order clarifying the preliminary injunction entered November 29, 1963, by declaring that the phrase, "the ordinary course of payment," as used in paragraph 3 of the preliminary injunction, does not require that defendant act upon vouchers submitted by plaintiff until the vouchers have been approved in accordance with the payroll procedures of the Navajo Tribe.

The facts giving rise to this motion are as follows:

In paragraph 3 of the order following the findings of fact and conclusions of law, the defendant was enjoined from

3. Stopping or preventing the ordinary course of payment to him [plaintiff] pursuant to R.S. § 2104 (25 U.S.C. § 82) of the agreed retainer fee due under said approved contract with all approved amendments thereto, including sums now due him for services performed thereunder during the months of September and October 1963.

Paragraph 4a of the attorney contract provides that the plaintiff, as general counsel for the Navajo Tribe, "shall be paid an annual compensation out of funds of the Navajo Tribe." Paragraph 3 of Amendment No. 6 to the Navajo Tribal attorney contract provides as follows:

The said General Counsel services are to be rendered on an annual basis, but compensation to be paid therefor

as hereinabove provided, shall be paid for the convenience of all parties *in accordance with the payroll practices of The Navajo Tribe*, but in not less than twelve equal installments on the first day of each month, commencing September 1, 1957. (emphasis supplied)

The "payroll practices of The Navajo Tribe" and the manner in which the plaintiff has been paid since the approval of the contract are as follows: Each year the Navajo Tribe submits to the Department of the Interior a budget for operating expenses for the year to follow. The Department of the Interior, pursuant to authorization by Congress, withdraws funds on deposit in the Treasury of the United States to the credit of the Navajo Tribe and transmits those funds to the Tribe for deposit in a privately-owned bank or depository in the account of the Tribe. Those funds are drawn upon by checks signed by the authorized officials of the Navajo Tribe pursuant to the provisions of the Navajo Tribal Code. The Secretary of the Interior does not draw upon funds of the Tribe.

In accordance with the "payroll practices of The Navajo Tribe," the vouchers for payment for plaintiff's services have been submitted by him to the Chairman of the Navajo Tribal Council. Upon approval by the Chairman the vouchers are forwarded by the Chairman to the Department of the Interior for approval by the Secretary pursuant to 25 U.S.C. 82. When approved by the Secretary, the vouchers are returned to the Chairman of the Navajo Tribal Council and a check drawn on the privately-owned bank or depository in which the Navajo funds are deposited is prepared in the approved amount and signed by the Chairman and countersigned by the Treasurer of the Navajo Tribe. That check is then delivered to the payee. This procedure is in accordance with Titles 2 and 12 of the Navajo Tribal Code.

By letter dated August 27, 1964, vouchers for the month of November 1963 and subsequent months were submitted to the Department of the Interior but those vouchers have not been approved or disapproved by the Chairman of the

Navajo Tribal Council in accordance with the payroll practices of the Tribe. The defendant, therefore, has not examined or audited those vouchers to determine whether they should be approved pursuant to 25 U.S.C. 82 and is of the opinion that they should not be approved or disapproved by him until first acted upon by the Chairman of the Tribe, since this is the only orderly and reasonable procedure and it has been the procedure for the past 16 years under the payroll practices of the Tribe.

Accordingly, the defendant hereby informs the Court that he intends to return the vouchers to the Chairman with a request that they be either approved or disapproved promptly and then sent back for defendant's examination, pursuant to the provisions of 25 U.S.C. 82. However, defendant anticipates that this procedure may give rise to further controversy unless the Court makes clear that it is not prohibited by the preliminary injunction. The defendant therefore requests the Court to declare that the phrase "the ordinary course of payment," as used in paragraph 3 of the preliminary injunction, does not require that defendant act upon vouchers submitted by plaintiff until the vouchers have been approved or disapproved in accordance with the payroll procedures of the Navajo Tribe, as provided in the Navajo Tribal Code.

Respectfully,

HERBERT PITTLE

THOMAS L. McKEVITT

Attorneys, Department of Justice

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT OF THE
DISTRICT OF COLUMBIA

NORMAN M. LITTELL, *Plaintiff*,

v.

STEWART L. UDALL, Secretary of the Interior, *Defendant*.

Civil No. 2779-63

Memorandum of Points and Authorities in Support of Defendant's Motion to Clarify Preliminary Injunction

Rule 65, Federal Rules of Civil Procedure; *Schoen v. Washington Post*, 246 F.2d 670, 100 U.S. App. D.C. 389 (C.A. 1957).

Respectfully,

HERBERT PITTLE

THOMAS L. McKEVITT

Attorneys, Department of Justice

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

NORMAN M. LITTELL, *Plaintiff*,

v.

STEWART L. UDALL, Secretary of the Interior, *Defendant*.

C.A. No. 2779-63

Plaintiff's Opposition to Defendant's Motion to Clarify Preliminary Injunction

The defendant, hereinafter "the Secretary," has moved for an order "clarifying" the preliminary injunction heretofore entered in this case by declaring that the phrase, "the ordinary course of payment" in par. 3 of that injunction "does not require that defendant act upon vouchers

submitted by plaintiff until the vouchers have been approved in accordance with the payroll procedures of the Navajo Tribe."

LEGAL BASIS FOR OPPOSITION

The plaintiff, hereinafter "the General Counsel," opposes that motion on several grounds:

1. The Secretary's motion is a patent endeavor on his part to perpetuate the breach of a contract that he has been solemnly forbidden to breach further, by continuing to deprive the General Counsel of compensation thereunder, the latter not having been paid for ten months thereunder. (See pars. G-K, below, and Exhs. 3-9.)

2. The Secretary's motion fails to disclose that the failure of Chairman Nakai of the Navajo Tribal Council, hereinafter "the Chairman," to act on the General Counsel's monthly vouchers for a period of nearly ten months has been encouraged and publicly supported by the Secretary in litigated proceedings in United States Courts. (See pars. B-F and N-O, below, and Exhs. 1, 2, 13, and 14.)

3. The Secretary is accordingly seeking to escape from a dilemma that he has himself created but that he has failed to disclose to this Court. (References under §§1 and 2, above, also par. P, below, and Ex. 15.)

4. In view of the Chairman's failure to approve or disapprove the General Counsel's vouchers over a period of at least eight months, it would obviously be useless to permit the defendant to do what he proposes to do, namely (Motion, p. 3), "to return the vouchers to the Chairman with a request that they be either approved or disapproved promptly and then sent back for defendant's examination, pursuant to the provisions of 25 U.S.C. 82." After all, the law does not require the doing of a useless act. (See pars. L and M, below, and Exhs. 10-12.)

5. The Secretary has full statutory power to pay the vouchers in the absence of Tribal action. (See par. Q. below.)

6. The Secretary's motion here neither discloses that he has encouraged the Chairman in his resistance to the General Counsel, nor that, in seeking to defeat the General Counsel's rights, the Secretary has made inconsistent representations to two United States Courts of Appeals. Thus it is obvious that, in seeking to delay still further the payment of the General Counsel's compensation under a contract that the Secretary undertook to breach, and which but for this Court's intervention he would have terminated without authority of law, the Secretary is seeking to profit by his own wrongful act while failing to do equity by making full and frank disclosure to the tribunal from which he asks relief. His present motion would properly be denied on that ground alone.

FACTUAL BASIS FOR OPPOSITION

A. On November 29 last, this Court enjoined the defendant Secretary from:

"1. Terminating or cancelling the contract of plaintiff's employment as General Counsel and Claims Attorney of the Navajo Tribe of Indians, which said contract was approved on November 15, 1957, as of August 5, 1957, as further amended and approved;

"2. Suspending or otherwise improperly interfering with the performance by the plaintiff under and pursuant to said approved contract with all approved amendments thereto: and

"3. Stopping or preventing the ordinary course of payment to him pursuant to R.S. §2104 (25 U.S.C. §82) of the agreed retainer fee due under said approved contract with all approved amendments thereto, including sums now due him for services performed there-

under during the months of September and October 1963."

That injunction was affirmed by the United States Court of Appeals for the District of Columbia Circuit on August 13 of this year. *Udall v. Littell*, No. 18,338.

B. On February 11, 1964, the General Counsel brought an action against the Chairman in the United States District Court for the District of Arizona to restrain the Chairman's interference with the same contract that is involved in the present case, praying *inter alia* for an injunction

"(c) Prohibiting the Defendant and all others acting in concert with him or at his direction from prohibiting or preventing payment to Plaintiff of those sums due or to become due to Plaintiff under the terms of his Contract with the Navajo Tribe of Indians."

Attached hereto as Exhibit 1 and made a part hereof is a copy of the Transcript of Record of the foregoing case on appeal, *Littell v. Nakai*, No. 19,296 in the United States Court of Appeals for the Ninth Circuit; the complaint with attached exhibits appears at pp. 3-28 thereof, and the quoted prayer is at pp. 12-13.

C. On the same day, February 11, 1964, the United States District Court for the District of Arizona entered a temporary restraining order prohibiting the Chairman from interfering with the performance of the General Counsel's contract by continuing to eject him from the meetings of his client's governing body, the Navajo Tribal Council. This temporary restraining order appears at pp. 39-40 of Exhibit 1.

D. Two days later, on February 13, 1964, the Department of the Interior made written request to the Department of Justice that it intervene in the foregoing case of *Littell v. Nakai*, "in order to protect the interests of the United States in the maintenance of tribal self-govern-

ment." A copy of this written request is attached hereto as Exhibit 2 and made a part hereof.

E. Thereupon, the United States Attorney for the District of Arizona filed in said case of *Littel v. Nakai* a "Representation of the Interests of the United States," in which he asserted that "The United States has a continuing interest in the preservation of the independence of tribal governments," and concluded by submitting "that a preliminary injunction should not issue and that this case should be dismissed." This "Representation," &c., appears at pp. 41-42 of Exhibit 1.

F. Subsequently, on February 24, 1964, the United States District Court for the District of Arizona dismissed the case of *Littel v. Nakai* "for want of jurisdiction." The General Counsel appealed, and, as Exhibit 1 shows, that cause is now pending in the Ninth Circuit. The order of dismissal appears at p. 49 of Exhibit 1, the General Counsel's notice of appeal at p. 50 of the same exhibit.

G. While the foregoing proceedings were pending, the General Counsel moved in this Court to cite the Secretary and two of his subordinates for contempt because of their alleged complicity in the Chairman's ejection of the General Counsel from meetings of the Navajo Tribal Council. In an oral opinion rendered on March 24, 1964, and in an order filed in this cause on April 6, 1964, Judge Sirica held that the General Counsel had both the right and the duty to meet with the Navajo Tribal Council, saying orally, "I sincerely believe that from this moment on, if the Secretary instructs the Indian Bureau people to tell Mr. Nakai to lay off Mr. Littell, he won't have a bit of trouble." A copy of Judge Sirica's opinion and order, as they were presented to the United States Court of Appeals for the District of Columbia Circuit, is attached hereto as Exhibit 3 and made a part hereof.

H. On April 9, 1964, one of the General Counsel's attorneys of record in this cause requested the Assistant Attor-

ney General in charge of the Lands Division to expedite the processing and payment of the General Counsel's unpaid vouchers. A copy of the retained carbon of that letter is attached hereto as Exhibit 4 and made a part hereof.

I. On April 21, 1964, the Department of Justice replied, stating that all vouchers submitted by the General Counsel that had reached the Department of the Interior had been processed, and requesting information whether further vouchers were pending. In reply, the General Counsel's attorney advised on April 24, 1964, that four of the General Counsel's monthly retainer vouchers remained unpaid. On May 7, 1964, the Department of Justice wrote to say that none of those vouchers "had been received either at the Navajo Indian Agency or Washington." Copies of these letters are attached hereto as Exhibits 5, 6, and 7, respectively, and made a part hereof.

J. More than four months later, on August 31, 1964, the General Counsel's attorney once more made inquiry of the Department of Justice regarding the unpaid vouchers, which by then covered nine unpaid monthly retainer vouchers and five unpaid expense vouchers, and which, on information, were said to be on the desk of the Indian Superintendent for the Navajo Agency. On September 4, 1964, the Department of Justice replied to say that all of the foregoing vouchers "have been sent by the Superintendent to the Department of the Interior here in Washington. We are making inquiry of that Department and will get in touch with you next week." Copies of these letters are attached hereto as Exhibits 8 and 9, respectively, and made a part hereof.

K. The only further reply made by the Department of Justice was the filing of the present motion on September 11, 1964.

L. At the present time, no less than ten of the General Counsel's monthly retainer vouchers remain unpaid, the

first of which was submitted some eight months ago, in contrast to the situation obtaining before the Secretary undertook to terminate the General Counsel's contract, when such vouchers were paid within three weeks after submission; these facts appear from the schedule attached as Exh. A to the plaintiff's affidavit, which is attached hereto as Exhibit 10 and made a part hereof. The affidavit of Walter F. Wolf, Jr., of the Legal Staff of the Navajo Tribe of Indians, which is attached hereto as Exhibit 11 and made a part hereof, shows that each of the foregoing unpaid vouchers was received in his office and sent to the Chairman's office not later than the next business day after they were received. The affidavit of Mrs. Annie Wauneka, a member of the Navajo Tribal Council, which is attached hereto as Exhibit 12 and made a part hereof, shows that one, Leo Denetsone, Executive Assistant to the Chairman, admitted keeping on his desk, without taking any action thereon over an eight month period, all of the General Counsel's unpaid vouchers. See also, to the same effect, Exh. B attached to the General Counsel's own affidavit, Exhibit 10.

M. Par. 7 of the affidavit of Mrs. Wauneka further shows that, when she criticized Leo Denetsone in front of the Navajo Agency Superintendent, Glenn Landbloom, because of his conduct as aforesaid,

"Mr. Landbloom said, 'Wait a minute, don't blame everything on Leo. Mr. Nakai knows about these vouchers. He is the one holding back these vouchers. Mr. Nakai is at fault just as much as Leo.' I then asked Mr. Landbloom if he meant to say that Mr. Nakai knew about these vouchers all this time and yet had told the Council he had never seen them. Mr. Landbloom said, 'Sure he knew about those vouchers.'"

Landbloom, the Navajo Agency Superintendent (par. 3 of Ex. 10) is a subordinate of the defendant Udall, and is

plainly within the terms of the injunction that the defendant now seeks to have "clarified," an injunction that runs against "the defendant, Stewart L. Udall, Secretary of the Interior, his officers, agents, subordinates, and employees." Moreover, Landbloom's admissions bind his superior under familiar principles.

N. During the period while Chairman Nakai and his office staff were sitting on the unpaid vouchers without taking any action whatever thereon, the General Counsel was appealing from the dismissal of his action against the Chairman in which, see par. B above, he had sought injunctive relief against stoppage of payments due under his approved contract with the Navajo Tribe of Indians. Chairman Nakai in that appeal continued to dispute Judge Sirica's ruling that the General Counsel had a right to attend meetings of the Navajo Tribal Council. A copy of the Chairman's brief in the Ninth Circuit is attached hereto as Exhibit 13 and made a part thereof; his argument that his expelling the General Counsel from the meetings of the Navajo Tribal Council did not constitute any interference with the General Counsel's performance of the latter's contract with the Navajo Tribe of Indians is at pp. 4-17 of Exhibit 13.

O. The United States, which at the defendant Secretary's request injected itself into the Arizona contest between the General Counsel and the Chairman, has continued to stand at the Chairman's side as he puts forward the same untenable justification of his interference that Judge Sirica rejected. In its brief filed in support of the Chairman on that appeal, it repeats his contentions and citations, urging *inter alia* that "The federal courts will not interfere with internal affairs of Indian tribes as sought by Appellant." A copy of the United States' brief *amicus curiae* in the Ninth Circuit, signed by Assistant Attorney General Clark, United States Attorney Muecke, and Attorney Marquis, is attached hereto as Exhibit 14 and made a part hereof.

P. Following the affirmance by the District of Columbia Circuit of the preliminary injunction against the Secretary, that officer filed a "Petition of the Appellant for Rehearing or for Clarification of Opinion," in the course of which he said the following, speaking through Assistant Attorney General Clark, and Attorneys Marquis, Pittle, and McKevitt:

"But the opinion omits the very basic truth that the Tribe is not a free agent nor are the rights of the Tribe as a whole subjected completely to the will of the majority of the Council. The opinion ignores entirely the fact that this client is, in effect, under disability, i.e., the so-called federal guardianship. This federal power and duty have always been broadly applied to protect all of the Tribe against actions of its governing bodies as well as any outsider dealing with them.

* * * * *

"As we noted in our earlier briefs, the control of the Secretary over attorneys' contracts with the tribes was in execution of this moral obligation. The federal control has not been terminated as to the Navajo Tribe. There is nothing in *Oliver v. Udall*, 113 U.S.App. D.C. 212, 306 F.2d 819 (1962), cert den., 372 U.S. 908, to justify such a conclusion. No distinction can be made in this regard between the Navajo Tribe and, for example, the Seminole Tribe. The decision is contradictory to the basic principle of federal-Indian relations and should therefore be reexamined."

A copy of this Petition, &c., marked Exhibit 15, is attached hereto and made a part hereof.

Q. On July 7, 1964, the President approved the Interior Department Appropriation Act for 1965, Pub. L. 88-356, 78 Stat. 273, which at p. 275 provides that "In addition to the tribal funds authorized to be expended by existing

law, there is hereby appropriated \$3,000,000 from tribal funds not otherwise available for expenditure for the benefit of Indians and Indian tribes, including * * * compensation and expenses of attorneys and other persons employed by Indian tribes under approved contracts; * * *."

DISCUSSION

It is obvious that the Secretary has the power to process the General Counsel's unpaid retainer and expense vouchers without reference to prior approval, disapproval, or lack of any action thereon by the Chairman.

It is also obvious that the Chairman's opposition to and interference with the General Counsel's performance of his contract has been consistently supported by the Department of Justice at the specific request of the Department of the Interior. Thus the Secretary is himself responsible for the Chairman's continued inaction.

Finally, it is obvious that it would be a useless and nugatory act for the Secretary to return the unpaid vouchers to the Chairman, after they had already been resting in the latter's office without action for some eight months.

From the foregoing it necessarily follows that the Secretary has presented a self-created dilemma in an effort to continue his interference with the performance of the General Counsel's contract, while simultaneously seeking to avoid another motion to be cited for contempt for disobedience of the injunction.

The same conclusion flows from the inconsistency in the representations made by the same attorneys on behalf of the Secretary in two different Circuits: They tell the Ninth Circuit that Indian self-government must prevail, while simultaneously they represent to the District of Columbia Circuit that the Federal guardianship is paramount. The

only consistency in this obvious inconsistency is that each position is directed against the General Counsel: When the Chairman opposes him, Indian self-government must prevail. But when the Tribal Council supports him, then the Secretary's brand of guardianship is superior.

The Secretary's failure to disclose the foregoing inconsistency in his present motion constitutes at the very least a non-observance of the equitable maxims that he who seeks equity must do equity, and that doing equity requires a litigant to be frank and fair with the courts. Moreover, the Secretary's non-disclosure of his own support of the Chairman's inaction in the Ninth Circuit, while relying on that same inaction as a basis for the present motion, which if granted would effectuate the Secretary's original purpose of terminating the General Counsel's contract and of denying him further compensation thereunder, constitutes a particularly glaring instance of a litigant seeking to benefit by his own misdeeds.

This Court has enjoined the Secretary from terminating the General Counsel's contract. This Court has further enjoined the Secretary from interfering with "the ordinary course of payment" of vouchers under that contract. Viewed in the light of the indisputable facts disclosed by the exhibits to this opposition, the Secretary's present attempt to halt that ordinary course of payment on the ground that, helped and abetted by the Department of the Interior's own actions, the Chairman has over a space of some ten months failed either to approve or disapprove a whole series of the General Counsel's vouchers, stands as a palpable subterfuge to obtain judicial dispensation for the defendant Secretary's violation of the injunction. His present motion should be dealt with accordingly.

CONCLUSION

For the foregoing reasons, the Secretary's motion for clarification should be denied.

Dated this 29th day of September, 1964.

Respectfully submitted.

/s/ FREDERICK BERNAYS WIENER
FREDERICK BERNAYS WIENER
1750 Pennsylvania Avenue, N.W.,
Washington, D. C. 20006

JOHN F. DOYLE,
1815 H Street, N.W.,
Washington, D. C. 20006

Attorneys for the Plaintiff.

Exhibit 1

[Dep't of Justice has copy of printed record in *Littell v. Nakai*, C.A. 9, No. 19296]

Exhibit 2

[Original is in Dep't of Justice files]

Exhibit 3

[Dep't of Justice has copies of Judge Sirica's opinion and order]

Exhibit 4

9 April 1964

Hon. Ramsey Clark,
Assistant Attorney General,
Department of Justice,
Washington, D. C. 20530

Re: Littell v. Udal, C. A. 2779-63

Dear Mr. Clark:

Paragraph 3 of the preliminary injunction entered in the above-entitled cause on 29 November last enjoins the Secretary of the Interior from:

“3. Stopping or preventing the ordinary course of payment to [the plaintiff] pursuant to R.S. § 2104 (25 U.S.C. § 82) of the agreed retainer fee due under said approved contract with all approved amendments thereto, including sums now due him for services performed thereunder during the months of September and October 1963.”

During the portion of the calendar year 1963 that antedated the Secretary's suspension of Mr. Littell, the elapsed time between submission and payment of the latter's vouchers under his approved contract with the Navajo Tribe of Indians was as short as 14 days, averaged 21 days, and did not exceed 35 days.

Since the entry of the above-mentioned preliminary injunction, vouchers submitted by Mr. Littell have gone unpaid for longer than 70 days, and a number of these, the earliest of which was submitted some 73 days ago, still remain unpaid.

That this delay is not attributable to inaction on the part of the Chairman of the Navajo Tribal Council clearly appears from an affidavit executed by said Chairman on 18

February 1964, and filed by him in the case of *Littell v. Nakai*, (D. Ariz.; C.A. 876-Pct). There he deposed that:

"I categorically deny (as alleged in the complaint) that I have prohibited or prevented payments to him of sums due under his employment contract."

Similarly, vouchers submitted by Mr. Littell for reimbursement for expenditures incurred by him on behalf of the Navajo Tribe of Indians have remained unpaid for longer than 40 days.

Paragraph 3 of the preliminary injunction of 29 November, quoted above, is not questioned in the Secretary's brief in the appeal from that injunction, now pending in the Court of Appeals for the D. C. Circuit as No. 18,338, nor need I labor the proposition that, even if it were, it is binding on the parties until and unless stayed or otherwise set aside.

The net of the foregoing is that it would plainly be in the best interest of both Messrs. Udall and Littell if the Secretary took steps to accelerate the processing of the latter's pending vouchers so that they would be paid as promptly as was the case during the earlier part of last year. I am accordingly writing to enlist your aid in that behalf, lest the issues between the parties to the above-entitled litigation be further proliferated.

Sincerely yours,

/s/ FREDERICK BERNAYS WIENER
Counsel for the Plaintiff.

FBW/hsw

Exhibit 5

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D. C.

April 21, 1964

DRW:HP

90-1-4-100

Frederick Bernays Wiener, Esquire
1025 Connecticut Avenue, N.W.
Washington, D. C.

Dear Mr. Wiener:

This will refer to our letter of April 13, responding to your letter of April 9, 1964, regarding the case entitled *Littell v. Udall*, Civil No. 2779-63 in the United States District Court for the District of Columbia.

The Department of the Interior has informed us that Mr. Littell's expense voucher for September 1963 was approved for payment by that Department and was returned to the Navajo Tribe on October 15, 1963. His salary vouchers for September and October 1963 were approved for payment and returned to the Navajo Tribe on March 2, 1964. The Department has stated that no vouchers for subsequent months have been received. We desire to know whether any salary vouchers have been submitted by Mr. Littell subsequent to October or whether any other salary or expense vouchers are pending.

The Department of the Interior has also advised us that its field personnel are under instructions to forward all vouchers for payment to Mr. Littell immediately upon receipt and approval. As you may know, Mr. Littell's vouchers are submitted by him first to the Navajo Tribe for examination and approval. They are then forwarded to the Department and after a determination by the Department the vouchers are returned to the field for immediate delivery to

the Navajo Tribe. This procedure contemplates no delay in the processing of vouchers by the Department of the Interior. We have been informed further that Interior intends to continue to give prompt attention to the processing of all vouchers which are submitted to it.

Sincerely,

RAMSEY CLARK
Assistant Attorney General
Lands Division

By:

/s/ DAVID R. WARNER
DAVID R. WARNER

Chief, General Litigation Section

Exhibit 6

cc: John F. Doyle, Esq.
cc: Norman M. Littell, Esq.

24 April 1964

Hon. Ramsey Clark,
Assistant Attorney General,
Lands Division,
Washington, D. C. 20530.

Re: Littell v. Udall, D.D.C., C.A. 2779-63

Dear Mr. Clark:

This will acknowledge with thanks Mr. Warner's letter of 21 April in this matter, your file DRW:HP 90-1-4-100.

In response to his inquiry, I submit the following list of vouchers submitted by Mr. Littell that remain unpaid:

<i>Nature of Voucher</i>	<i>Date submitted</i>
Retainer for November 1963	27 Jan. 1964
Retainer for December 1963	Between 20 and 26 Feb. 1964
Retainer for January 1964	27 Feb. 1964
Retainer for February 1964	11 Mar. 1964
Expenses incurred December 1963	24 Feb. 1964

As I say, none of the foregoing vouchers has yet been paid.

Sincerely yours,

/s/ FREDERICK BERNAYS WIENER
Counsel for Mr. Littell.

FBW/hsw

Exhibit 7

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

May 7, 1964

DRW:HP

90-1-4-100

Frederick Bernays Wiener, Esquire
1025 Connecticut Avenue, N.W.
Washington, D. C.

Dear Mr. Wiener:

This will acknowledge your letter of April 24, 1964, regarding the case entitled *Littell v. Udall*, Civil No. 2779-63 in the United States District Court for the District of Columbia.

The Department of the Interior was informed that the vouchers listed in your letter were submitted by Mr. Littell but have not been paid. That Department has informally advised us that an examination of its records discloses that none of the vouchers described has been received either at the Navajo Indian Agency or Wahington. Inasmuch as Mr.

Littell's vouchers are first submitted by him to the Navajo Tribe for examination and approval, it seems apparent that the Tribe has not yet forwarded them to the Department of the Interior. We will advise you of the results of further inquiry.

Sincerely,

RAMSEY CLARK
Assistant Attorney General
Lands Division

By:

/s/ DAVID R. WARNER
DAVID R. WARNER
Chief, General Litigation Section

Exhibit 8

31 August 1964

Hon. Ramsey Clark,
Assistant Attorney General,
Lands Division,
Department of Justice,
Washington, D. C. 20530.

Re: Littell v. Udall, D.D.C., C.A. 2779-63

Dear Mr. Clark:

Please refer to our previous correspondence, your file DRW:HP 90-1-4-100, with particular reference to Mr. Littell's unpaid vouchers for monthly retainer payments and out-of-pocket expenses submitted in connection with his approved contract as General Counsel and Claims Attorney of the Navajo Tribe of Indians.

As of this time, no vouchers submitted in respect of his retainer under that contract have been paid, beginning with the one submitted for the month of November 1963, with the result that has had no payment whatever over a 9 months period.

Inasmuch as I have received information that these 9 unpaid retainer vouchers together with some 5 unpaid expense vouchers are now on the desk of Superintendent Landbloom, the Indian Bureau's representative at Window Rock, I am writing to inquire what steps if any are being taken to process these several vouchers to the end that Mr. Littell may be compensated pursuant to the terms of his approved contract.

Sincerely yours,

/s/ FREDERICK BERNAYS WIENER
Counsel for Mr. Littell.

FBW/hsw

Exhibit 9

**UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.**

September 4, 1964

DRW-HP
90-1-4-100

Frederick Bernays Wiener, Esquire
1750 Pennsylvania Avenue, N.W.
Washington, D. C. 20006

Dear Mr. Wiener:

This will acknowledge your letter of August 31, 1964, regarding vouchers submitted by the plaintiff in the case entitled *Norman M. Littell v. Stewart L. Udall, Secretary of the Interior*, Civil No. 2779-63, in the United States District Court for the District of Columbia.

We note that you have received information that nine unpaid retainer vouchers, together with five unpaid expense vouchers, were submitted to the Superintendent at Window Rock. We have learned that the vouchers have been sent by the Superintendent to the Department of the Interior

here in Washington. We are making inquiry of that Department and will get in touch with you next week.

Sincerely,

RAMSEY CLARK
Assistant Attorney General
Lands Division

By:

/s/ DAVID R. WARNER
DAVID R. WARNER
Chief, General Litigation Section

Exhibit 10

IN THE UNITED STATES DISTRICT COURT OF THE
DISTRICT OF COLUMBIA

NORMAN M. LITTELL, *Plaintiff*,

v.

STEWART L. UDALL, Secretary of the Interior, *Defendant*.

C.A. No. 2779-63

AFFIDAVIT

NORMAN M. LITTELL, being first duly sworn on oath, deposes and says:

Affiant makes this affidavit in opposition to the motion of the Defendant asking clarification of paragraph 3 of the temporary injunction issued in the above entitled cause on November 29, 1963.

1. For over seventeen years, during which time Affiant has served the Navajo Tribe as General Counsel and Claims Attorney, vouchers have been submitted by Affiant and paid by the Navajo Tribe pursuant to the regulations of the Department of the Interior and of the Navajo Tribe in substantially the following manner, with procedural variations

of no material significance here. Vouchers have been prepared and submitted at periodic intervals for compensation for services as General Counsel services, such as travel expenses. Vouchers in respect to prosecuting claims for the Navajo Tribe have never related to compensation, as compensation for such work is on a contingent basis in the event of recovery for the Tribe, but costs and expenses incurred for claims work were regularly claimed by way of reimbursement on Claims vouchers. Affiant has regularly sent via airmail to the office of the General Counsel at Window Rock, Arizona, from Affiant's Washington office, whatever vouchers were due for payment. These have regularly been approved by a Tribal officer, referred to the Bureau of Indian Affairs Fiscal Office at Gallup, New Mexico, and when approved, were returned to the Tribal offices at Window Rock, Arizona, from which a check would then be airmailed to Affiant in Washington, D. C.

Attached hereto, as Exhibit A, is a list of 38 vouchers representing all vouchers for General Counsel compensation, pursuant to the attorney contract of the Affiant with the Navajo Tribe, approved August 8, 1957, for the years 1962, 1963 and 1964. The first column shows the month in which the services were rendered. The second column shows the date upon which the voucher for that month was mailed to Window Rock, Arizona. The third column shows the date when payment was received by Affiant by check from the Navajo Tribe at Window Rock, and the fourth column shows the elapsed time between mailing of vouchers and receipt of payment, or, in the alternative in respect to unpaid vouchers, the elapsed time to September 20th, 1964.

Subject to occasional delays because of procedural changes (such as, for example, the months of October, November and December 1962), the payment of vouchers in 1962 and the first six months of 1963 were fairly typical of preceding years when vouchers were usually paid in two or three weeks time.

2. Tribal funds were unanimously appropriated by the governing body of the Navajo Tribe, the Navajo Tribal Council, consisting of 74 elected Councilmen, on May 7, 1963 for the fiscal year commencing July 1, 1963. Vouchers numbered 23 through 38 on Exhibit A are the unpaid vouchers. These include vouchers for General Counsel compensation and for reimbursement for Tribal expenses to attend the Council meetings of the Navajo Tribal Council commencing December 9, 1963, and a later meeting commencing January 27, 1964, which Judge Sirica of this Court ruled that it was not only the right but the duty of Affiant to attend. These vouchers numbered 23 through 38 were not signed by Chairman Nakai. Affiant is reliably informed and believes that said vouchers were handed to Superintendent Landbloom at Window Rock, Arizona, on or about August 24th by Leo Denetsone, Administrative Assistant to Chairman Nakai.

3. From time to time, in over ten months which have elapsed since November 1963 without payment of compensation or reimbursement in any manner whatsoever of sums advanced by Affiant for Navajo legal business, Affiant has asked Associate Attorney Walter F. Wolf, Jr., in the Tribe's legal staff at Window Rock, as to what action, if any, had been taken by Chairman Nakai in respect to the vouchers delivered to the Chairman's office. On August 6, 1964, Affiant telephoned the aforesaid Walter F. Wolf, Jr., at Window Rock, and in Affiant's capacity as General Counsel, instructed Mr. Wolf to call upon Mr. Nakai and advise him of Affiant's opinion as General Counsel that it was Chairman Nakai's duty to sign the vouchers as the chief administrative officer of the Tribe, obligated as such to carry out the will of the Navajo Tribal Council pursuant to the Tribal budget approved by the Council, and pursuant to the Navajo Tribal Code (2 N.T.C. § 763).

On Monday, August 17, 1964, during a long distance telephone conference between Affiant in Washington, D. C., and Walter F. Wolf, Jr., in Window Rock, Arizona, Affiant

asked Mr. Wolf in regard to the results of his conference with Chairman Nakai on the subject of vouchers, and was advised by the said Wolf that Affiant's instructions had been carried out, and Chairman Nakai had been advised by Wolf in accordance with Affiant's instructions. Mr. Nakai advised the said Wolf that he would think it over.

4. At this time, the Navajo Tribal Council was in continuous session at Window Rock, voting upon the various items of the Navajo Tribal Budget. The Legal Budget for the fiscal year commencing July 1, 1964 was approved by a vote of 58 to 3, including all items of compensation and expense for all authorized legal positions in the Tribe's staff including Affiant and six other attorneys.

Affiant was reliably informed and believes that questions were asked on the floor of the Council on or about August 19th to 21st in regard to the reasons for nonpayment of these vouchers pursuant to the Tribal Budget for the current and preceding fiscal year, as set out in a telegram of August 23, 1964 sent by Affiant to Councilwoman Annie D. Wauneka, Chairman Raymond Nakai, and Navajo Councilmen, in care of J. Maurice McCabe, Executive Secretary of the Navajo Tribe, copy of which telegram is attached hereto as Exhibit B.

/s/ NORMAN M. LITTELL
NORMAN M. LITTELL

DISTRICT OF COLUMBIA, ss:

Subscribed and sworn to before me, this 23rd day of September 1964.

/s/ ESTHER E. BROWN
Notary Public, D. C.

NORMAN M. LITTELL RETAINER VOUCHER PAYMENTS

1962	Date Mailed from D. C.	Date Payment Received by NML	Elapsed Time
1. Jan.	Jan. 31, 1962	Ck #126893—Feb. 14	12 days
2. Feb.	Feb. 28, 1962	Ck #128080—Mar. 10	11 days
3. Mar.	Mar. 30, 1962	Ck #129469—Apr. 11	12 days
4. Apr.	May 1, 1962	Ck #130881—May 11	10 days
5. May	May 31, 1962	Ck #134115—June 11	11 days
6. June	June 29, 1962	Ck #135382—July 16	17 days
7. July	July 31, 1962	Ck #136201—Aug. 9	9 days
8. Aug.	Aug. 31, 1962	Ck #141125—Sept. 15	15 days
9. Sept.		Ck #143256—Oct. 22	
10. Oct.	Nov. 1, 1962	Ck #144746—Nov. 23	22 days
11. Nov.	Dec. 1, 1962	Ck #146478—Jan. 2, 1963	30 days
12. Dec.	Jan. 1, 1963	Ck #148108—Feb. 4, 1963	35 days
1963			
13. Jan.	Feb. 1, 1963	Ck #143575—Feb. 21	21 days
14. Feb.	Mar. 4, 1963	Ck #149709—Mar. 19	15 days
15. Mar.	Apr. 3, 1963	Ck #151489—Apr. 26	23 days
16. Apr.	May 3, 1963	Ck #152685—May 17	14 days
17. May	June 7, 1963	Ck #154055—June 25	18 days
18. June	July 9, 1963	Ck #155485—July 29	20 days
19. July	Aug. 16, 1963	Ck #157493—Sept. 10	25 days
20. Aug.	Sept. 5, 1963	Ck #158293—Oct. 7	32 days
21. Sept.	Oct. 1, 1963	Ck #165931—Mar. 9	161 days
22. Oct.	Dec. 30, 1963	Ck #165931—Mar. 9	100 days
			Elapsed Time to Sept. 20, 1964
23. Nov.	Jan. 27, 1964	Unpaid to date	238 days
24. Dec.	Feb. 20 to 25, 1964	Unpaid to date	214-217 days
1964			
25. Jan.	Feb. 27, 1964	Unpaid to date	207 days
26. Feb.	Mar. 11, 1964	Unpaid to date	194 days
27. Mar.	Apr. 24, 1964	Unpaid to date	150 days
28. Apr.	May 15, 1964	Unpaid to date	129 days
29. May	June 9, 1964	Unpaid to date	103 days
30. June	July 7, 1964	Unpaid to date	76 days
31. July	Aug. 14, 1964	Unpaid to date	38 days
32. Aug.	Sept. 9, 1964	Unpaid to date	11 days
Miscellaneous Expense Vouchers			
33. Claims	April 24, 1964	Unpaid to date	150 days
34. Gen. C.	April 24, 1964	Unpaid to date	150 days
Travel Expense Vouchers			
35. Dec.	Feb. 24, 1964	Unpaid to date	210 days
36. Jan.	July 20-25, 1964	Unpaid to date	63-68 days
37. Jan.-Feb.	Sept. 3, 1964	Unpaid to date	17 days
38. July	Aug. 24, 1964	Unpaid to date	28 days

WESTERN UNION

Call Letters GGT
LT Collect

August 23, 1964

Mrs. Annie D. Wauneka, Councilwoman
Raymond Nakai, Chairman, Navajo Tribal Council
Navajo Councilmen
c/o Executive Secretary J. Maurice McCabe
The Navajo Tribe
Window Rock, Arizona

This reply to Mrs. Wauneka's much appreciated long distance telephone call of Sunday, August 23rd, is communicated through Executive Secretary McCabe for distribution.

Mrs. Wauneka advised me that the following representations were made to the Tribal Council on or about Wednesday, August 19, 1964, regarding thirteen vouchers for services and travel expenses submitted by me since October 1963, and still unpaid:

(1) Superintendent Landbloom said he had not received vouchers and would process them immediately if submitted by Nakai;

(2) Naki said, as he had already informed Associate General Counsel Wolf, that he did not have vouchers in his office and did not know where they were;

(3) Wolf said he had delivered every voucher as received from me since October 1963, to Chairman's office;

(4) Leo Denetsone, Administrative Assistant to Nakai, told Tribal Council he had retained these vouchers to "examine" them and had written a letter to me "last week" regarding two or three items and that when I had replied on these items, vouchers would be approved.

Please be advised that this disposition of the matter is wholly unsatisfactory for the following reasons:

First, there has been plenty of time to receive any such letter written by Denetsone as claimed, but as late as Sunday, August 23rd, no such letter has been received.

Second, Denetsone has no authority whatsoever to pass upon, review or withhold vouchers, thereby reversing a decision by the Navajo Tribal Council which unanimously, on May 10, 1963, voted funds to pay these vouchers and other Legal Department expenses. It can be added that Denetsone also lacks knowledge and experience in legal affairs and is in no way qualified to pass on these vouchers.

Third, as Chief Administrative officer under Tribal Code, Nakai had at all times the affirmative duty to approve vouchers for services pursuant to Tribal Contract as required by Council approval of budget.

Fourth, for seventeen years it has been the practice, if any item of expense was questioned, to pay the voucher except for that item, and ask for an explanation from the party submitting the voucher. Never before have the entire vouchers been pigeonholed and "examined" for ten months as in this case. Furthermore, there is nothing to "examine" about the monthly retainer vouchers for services rendered under attorney contract.

Fifth, it is perfectly obvious that suppressing these vouchers in the office of Denetsone, who is both legally unauthorized and unqualified to pass on them, is a transparent deception in order to prevent compliance with the Federal Court's Temporary Injunction of November 29, 1963, which required the Secretary not to interfere with payments to me pursuant to the attorney contract of August 8, 1957, fully confirmed by three court decisions.

Sixth, your attention is called to Amendment Number thirteen of the Attorney Contract providing for four modest salary raises for tribal attorneys at Window Rock, unanimously approved by the Tribal Council on May 10, 1963, and forwarded by Chairman Nakai to Superintendent Land-

bloom and concurring with the Council in making these recommendations. Amendment Number thirteen also was approved by the staff in the Bureau of Indian Affairs and referred to the Solicitor where it has remained ever since, unapproved. No amendment to the Navajo attorney contract has ever before remained without formal action of the Secretary of the Interior for this unconscionable length of time; namely, for over fifteen months, to the damage and injury of the Navajo Tribe in that three of these lawyers have resigned because of this failure and the fourth has notified me that he may do so.

Eighth, I cannot enumerate here the vital legal matters of the tribe which have not been referred to the Legal Department as in former days (in accordance with the practice of all big companies and businesses as well as state and federal governments), for the purpose of protecting the Navajos against invading interests. You all know how narrowly the tribe escaped from the Navajo Reservation Development Corporation by rescinding Council approval of a monopoly proposal in spite of extensive and expensive promoters' efforts. You are also aware of the glowing accounts in the *Navajo Times* of the oil leases being rapidly granted with the approval of the present Advisory Committee, and of the Sentry Oil Company exploration permit and lease in the Navajo-Hopi controverted area in excess of the authority given to the Advisory Committee in this matter by the Navajo Tribal Council. These and other major matters affecting the Navajo Tribe have passed and are passing through an inexperienced Advisory Committee without legal review, sometimes with a vote of only a few members, sometimes without legal authority and usually without knowledge of the Tribal Council. The Navajo Tribe has been deliberately deprived of legal advice in areas where it was badly needed to protect the Tribe's interests. I advise you that legal review is imperatively needed in your complex affairs.

Ninth, in view of the foregoing, I recommend first that any further harassment of the General Counsel and hindrance of legal services by means of delayed attention to vouchers be immediately terminated; secondly, that all vouchers be forthwith approved and submitted to the Bureau of Indian Affairs for review in the usual channels as in the past seventeen years; thirdly, that approval of Amendment Number thirteen by the Secretary of Interior be insisted upon forthwith.

I shall continue, as in the past, to perform my services as General Counsel, but there must be no further tortious interference with the performance of these duties.

Kindest regards,

NORMAN M. LITTELL.
General Counsel

Exhibit 11

AFFIDAVIT

STATE OF NEW MEXICO }
COUNTY OF McKINLEY } ss.

Walter F. Wolf, Jr., being first duly sworn, deposes and states:

1. That there are normally received in my office service and expense vouchers from Norman M. Littell and that in the normal course of business such vouchers are then sent to the office of the Chairman of the Navajo Tribal Council by the succeeding business day.

2. That Norman M. Littell on August 6, 1964, instructed me by telephone to advise the Chairman of the Navajo Tribal Council that personal service vouchers and expense vouchers should not be further withheld in his office; that the approval of the Chairman of the Navajo Tribal Council was an administrative act which the Chairman of the Navajo Tribal Council should perform as Chief Administrative

Officer of the Tribe; that there was no legal ground for the refusal of the Charman of the Navajo Tribal Council to refuse to sign and approve the service and expense vouchers of Norman M. Littell.

3. That on August 7, 1964, I did relay the advice of Norman M. Littell, as General Counsel of the Navajo Tribal, to the Chairman of the Navajo Tribal Council, and the Chairman of the Navajo Tribal Council advised me that he had not seen the vouchers himself; that he would consider the advice and advise me later what he planned to do.

Further Deponet saeth not.

/s/ WALTER F. WOLF, JR.
Walter F. Wolf, Jr.

The above Affidavit was subscribed and sworn to before me, the undersigned, a Notary Public, for the County of McKinley, State of New Mexico, this 12th day of September, 1964.

/s/ JOHN H. SCHUELLER
Notary Public

My commission expires:
July 9, 1968

Exhibit 12

AFFIDAVIT

STATE OF NEW MEXICO }
COUNTY OF MCKINLEY } ss.

Annie D. Wauneka, being first duly sworn, deposes and states:

1. That during the week of August 20, 1964, during a regular meeting of the Navajo Tribal Council convening at Window Rock, Arizona, Mr. Frankie Howard, a Navajo Tribal Councilman, questioned Chairman Raymon Nakai. Mr. Howard asked Chairman Nakai if he had seen the service vouchers of the Navajo Tribe's General Counsel,

Norman M. Littell. Chairman Raymond Nakai replied that he had never seen the vouchers.

2. That almost immediately after the question asked by Frankie Howard, Walter Wolf, the Assistant General Counsel, entered the Council Chamber. I immediately asked Mr. Wolf if he had seen the service vouchers of Mr. Littell. Mr. Wolf stated that the service vouchers had come to his office some time ago and that whatever vouchers came to his office he immediately took to the Chairman's office. I asked him if he had actually seen the vouchers and he replied that, yes, he had and had taken them to the Chairman's office.

3. While the Council was in session, Navajo Agency Superintendent Glenn Landbloom was in the Council Chambers so I asked Mr. Landbloom if he had seen the service vouchers of Mr. Littell. He said that he had not seen the vouchers.

4. About this time Mr. Leo Denetsone, Administrative Assistant to Chairman Nakai, entered the Council Chamber while the Tribal Council was in session and I asked him if he knew where the vouchers were. He said "yes," that he had them in his office. He stated, I am sending Mr. Littell a letter asking him about a few items and when Mr. Littell replies on some of the vouchers they will all be processed.

5. The following week on a Monday morning Councilman Harold Drake and I went to Mr. Glenn Landbloom's office where we discussed many things including the vouchers of Mr. Littell. Mr. Landbloom told us that when the vouchers were processed to him he was willing to forward them through channels right away. But he said that the vouchers had not been processed at that time and that they were certainly far overdue. After our discussion with Mr. Landbloom, I talked to Chairman Nakai and asked him whether he had seen the vouchers of Mr. Littell and he said that he had not. That same afternoon Mr. Pete Riggs, another

Councilman, and I went to see Mr. Denetsone. We told him that we had come to see him about the vouchers and asked him if he had sent the letter to Mr. Littell. I told Mr. Denetsone that I had talked to Mr. Littell over long distance telephone that very morning and Mr. Littell had advised me that he had not received any such letter. Mr. Denetsone said that he had not sent the letter. Mr. Denetsone then opened his desk and took a file from his desk, opened the file and said, these are the service vouchers of Mr. Littell. He then picked up a piece of paper which he said was the letter and said he was still going to send the letter to Mr. Littell. He said he needed an explanation on some of the vouchers. I then asked him what he wanted to know about the vouchers and how soon he was going to process them. He said, I'm going to do all I can to process them after I hear from Mr. Littell but that Mr. Nakai was not there and Mr. Nakai's signature was necessary on the vouchers. I reminded him of what Mr. Wolf had said on the Council floor about sending the vouchers over to Mr. Nakai's office after he had received them in his office. I said to Mr. Denetsone, are you sure that Mr. Nakai has never seen these vouchers. Mr. Denetsone said, no, and I said, why? He said it was his duty to correct the vouchers and see what they were all about before he presented them to Mr. Nakai. That he was going to give them to Mr. Nakai as soon as he returned from his trip to Atlantic City. Mr. Denetsone then placed a telegram he had received from Mr. Littell on his desk and said, I don't know where that telegram puts me because Mr. Littell says I have no authority. He then said, if I don't have the authority, where do I fit in. I told him that he was nothing but a dirty crook withholding the vouchers from Mr. Nakai to sign. I told him we are going to see that you process these vouchers. He said he had no authority and said then that he would take them and give them to Mr. Landbloom.

6. After a lengthy argument with Mr. Denetsone, I finally asked him if he knew what was going to happen to him

because of what he was doing in holding Mr. Littell's vouchers. He said he didn't know. I told him that he was a dirty crook and the one causing all this trouble. He looked as though he were about to cry so I left.

7. The last day of the Council session of September 1964, I asked Mr. Landbloom what he was going to do about Mr. Littell's vouchers. Mr. Landbloom said that Leo Denetsone brought them into his office and told him to do whatever he wanted to with them. Mr. Landbloom said he had shipped them to Washington for payment. I criticized Leo Denetsone in front of him and told him that Denetsone was doing nothing good for the Chairman. Mr. Landbloom said, "Wait a minute, don't blame everything on Leo. Mr. Nakai knows about these vouchers. He is the one holding back these vouchers. Mr. Nakai is at fault just as much as Leo." I then asked Mr. Landbloom if he meant to say that Mr. Nakai knew about these vouchers all this time and yet had told the Council he had never seen them. Mr. Landbloom said, "Sure he knew about those vouchers."

Further Deponet saeth not.

/s/ MRS. ANNIE D. WAUNEKA
Annie D. Wauneka

The above Affidavit was subscribed and sworn to before me, the undersigned, a Notary Public, for the County of McKinley, State of New Mexico, this 23rd day of September, 1964.

/s/ JOHN H. SCHUELLER
Notary Public

My Commission expires:
July 9, 1968

Exhibit 13

[Dept. of Justice has copy of Nakai brief in CA 9]
See Infra ——— .

Exhibit 14

[Dep't of Justice has copy of its own brief A.C. in the
C.A. 9]
See Infra ——— .

Exhibit 15

[Dept. of Justice has copy of its own Petition for Rehearing]
See Infra ——— .

* * * * *

IN THE UNITED STATES DISTRICT COURT OF THE
DISTRICT OF COLUMBIA

NORMAN M. LITTELL, *Plaintiff,*

v.

STEWART L. UDALL, Secretary of the Interior, *Defendant.*

C. A. 2779-63

**Points and Authorities in Support of Plaintiff's Opposition to
Defendant's Motion to Clarify Preliminary Injunction**

1. A litigant seeking the aid of a court of equity must do equity by making full and frank disclosure to the court. *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240.

2. A court of equity will not permit a litigant to profit by his own wrong. *Glus v. Brooklyn Eastern Terminal*, 359 U.S. 231, 232-233.

3. The law does not require the doing of a useless or nugatory act. *Tacey v. Irwin*, 18 Wall. 549, 551; *Sims v. Everhardt*, 102 U.S. 300, 310.

4. Any admission made by an agent acting within the scope of his authority binds his principal. 4 Wigmore, *Evidence* (3d ed. 1940) § 1078.

5. The Act of July 7, 1964, Pub. L. 88-356, 78 Stat. 273, 275, the current Interior Department Appropriation Act,

unconditionally authorizes the Secretary of the Interior to pay the compensation and expenses of attorneys employed by Indian tribes under approved contracts.

6. The Court of Appeals for this Circuit has upheld the validity of plaintiff's approved contract with the Navajo Tribe of Indians against the defendant Secretary's unauthorized attempt at termination. *Udall v. Littell*, No. 18,338, August 13, 1964.

Dated this 29th day of September, 1964.

Respectfully submitted,

/s/ FREDERICK BERNAYS WIENER
FREDERICK BERNAYS WIENER
1750 Pennsylvania Avenue, N.W.,
Washington, D. C. 20006

JOHN F. DOYLE,
1815 H Street, N.W.,
Washington, D. C. 20006,

Attorneys for the Plaintiff

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

NORMAN M. LITTELL, *Plaintiff*,

v.

STEWART L. UDALL, Secretary of the Interior, *Defendant*.

Civil No. 2779-63

**Defendant's Response to Plaintiff's Opposition to Motion to
Clarify Preliminary Injunction**

In his opposition to the defendant's motion to clarify the preliminary injunction, the plaintiff fails to state fully the basis for the defendant's motion. In addition, the plaintiff's memorandum contains a number of statements which are

mere conclusions of the plaintiff, are without any evidence to support them, and the truth of which the defendant categorically denies.

The plaintiff asserts that the defendant has moved for an order clarifying the preliminary injunction

* * * by declaring that the phrase, "the ordinary course of payment" in par. 3 of that injunction "does not require that defendant act upon vouchers submitted by plaintiff until the vouchers have been approved in accordance with the payroll procedures of the Navajo Tribe.

This is not the entire basis of the defendant's motion. The defendant's motion to clarify expressly points out that the preliminary injunction entered November 29, 1963, enjoined the defendant from

* * * stopping or preventing the ordinary course of payment to him [plaintiff] pursuant to R.S. § 2104 (25 U.S.C. § 82) of the agreed retainer fee due under said approved contract with all approved amendments thereto, including sums now due him for services performed thereunder during the months of September and October 1963.

The defendant's motion makes it plain that the plaintiff's contract with the Navajo Tribe provides that

The said General Counsel services are to be rendered on an annual basis, but compensation to be paid therefor as hereinabove provided, shall be paid for the convenience of all parties *in accordance with the payroll practices of The Navajo Tribe*, but in not less than twelve equal installments on the first day of each month, commencing September 1, 1957. (emphasis supplied)

The defendant has informed the Court that for more than 16 years the method for payment of plaintiff's general counsel services has been for the plaintiff to submit vouchers to the Chairman of the Navajo Tribal Council for approval. When approved the vouchers then have been trans-

mitted by the Chairman to the Department of the Interior for its consideration. Upon approval by the Department, the vouchers are then returned to the Navajo Tribal Council, which issues a check drawn on a private bank, which is the depository of the Navajo Tribal funds for the operation of its government.

It is apparent, therefore, that the defendant has *not* stated merely that "the ordinary course of payment" in paragraph 3 of the injunction does not require that defendant act upon vouchers until the vouchers have been approved in accordance with the payroll procedures of the Navajo Tribe.

The defendant has also informed the Court that the defendant does not pay the vouchers. The plaintiff asserts in paragraph 5 of his memorandum that "the Secretary has full statutory power to pay the vouchers in the absence of Tribal action." Plaintiff further informs the Court in paragraph 3 of his memorandum that "the Secretary is accordingly seeking to escape from a dilemma that he has himself created but that he has failed to disclose to this Court." The dilemma allegedly is based upon unsupported statements in paragraphs 1, 2 and 6 of plaintiff's memorandum, the truth of which the defendant denies, to the effect that defendant's motion for clarification "is a patent endeavor on his part to perpetuate the breach of a contract that he has been solemnly forbidden to breach further, by continuing to deprive the General Counsel of compensation thereunder"; that the Chairman of the Navajo Tribal Council "has been encouraged and publicly supported by the Secretary in litigated proceedings in United States courts" in his failure to act on the plaintiff's vouchers; that the Secretary "has encouraged the Chairman in his resistance to the General Counsel," and that "the Secretary has made inconsistent representations to two United States Courts of Appeals."

Up until the filing of the opposition to the defendant's motion to clarify the preliminary injunction, the plaintiff has consistently contended that the Navajo Tribe is a self-

governing body and that the Secretary of the Interior has now power to terminate or rescind the plaintiff's contract with that Tribe nor interfere with the plaintiff's contractual relations with the Tribe. In paragraph 5 of his opposition, the plaintiff now states, as pointed out above, that the Secretary has full statutory power to pay the vouchers in the absence of tribal action. It is, of course, true that the defendant, on the other hand, has taken the position that he has plenary authority to supervise and regulate all Indian-non-Indian relationships, except as expressly limited by Congress.

On appeal from the preliminary injunction entered by this Court, the Court of Appeals affirmed, stating, among other things, that there is no provision in the contract nor in the amendments which in terms may be read as authorizing termination by the Secretary (slip op., p. 6) and that the Secretary can point to no statute applicable here which confers upon him any such authority (slip op., p. 7). A motion for clarification of the opinion is now pending in the Court of Appeals.

In the meantime, the plaintiff brought suit in the United States District Court for the District of Arizona to enjoin the Chairman of the Tribal Council from preventing the plaintiff's attendance at council meetings. From an order denying the plaintiff's motion for injunction the plaintiff has appealed and the matter is pending in the United States Circuit Court of Appeals for the Ninth Circuit, *Littell v. Nakai*, No. 19296. In that case the United States first filed a representation of interest in the district court and subsequently filed a brief as amicus curiae in the Court of Appeals in which it is asserted that the Indian tribes are sovereign under the tutelage of the United States, enjoy immunity from suit, that the principle of tribal self-government, as well as the right of the United States to protect it, prevents interference by the Court with the internal affairs of the Navajo Tribe, and that the action to enjoin

the Chairman of the Tribal Council in that case constituted an attempt to interfere with the tribal government.

There is no inconsistency whatever in the positions asserted by the defendant in this case and the position asserted by the United States as amicus curiae in the *Nakai* case. Moreover, the Court of Appeals in the present case has concluded at most that the Secretary does not have authority to terminate the plaintiff's contract but it has not decided that it may interfere with the internal affairs of the tribal government.

Therefore, if a dilemma is presented, it is a dilemma in which the plaintiff now finds himself as a result of the inconsistent positions which he has espoused by asserting in the present action that the Secretary has no power to terminate the contract or interfere with his contractual relations (which would necessarily include payment of vouchers submitted by him to the Tribe) and his present assertion that the Secretary has full statutory power to pay vouchers in the absence of tribal action. Notwithstanding his insistence upon a strictly literal reading of the contract as excluding authority in the Secretary with respect to termination, the plaintiff would now have the Court require the Secretary to pay vouchers for the general counsel's services contrary to the express provisions in the plaintiff's contract and contrary to the long and consistent practice applied in the construction of the contract by the plaintiff and the Tribe. These inconsistencies in plaintiff's positions demonstrate beyond all question the need for clarification, as requested in defendant's motion.

Respectfully,

HERBERT PITTLE

THOMAS L. McKEVITT

Attorneys, Department of Justice

Attorneys for Defendant

* * * * *

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

NORMAN M. LITTELL, *Plaintiff*,

v.

STEWART L. UDALL, Secretary of the Interior, *Defendant*.

Civil No. 2779-63

Order

This cause coming on to be heard on the defendant's motion to clarify the preliminary injunction heretofore entered in this cause, and the Court having considered said motion and the plaintiff's opposition thereto and the points and authorities and the oral arguments of counsel in support of said motion and in opposition thereto, the Court being fully advised in the premises, it is this 2d day of November, 1964,

ORDERED, That the defendant's motion to clarify the preliminary injunction be, and it is hereby, denied.

FURTHER ORDERED, That this case shall be put on the Ready Calendar and be advanced for pretrial and trial.

United States District Judge

No objection as to form:
Attorney for the Defendant

1 Washington, D. C.
Monday, February 1, 1965

• • • • •

2 PROCEEDINGS

The Deputy Clerk: Littell vs. Udall.

Mr. Wiener: Ready for the plaintiff.

Mr. Pittle: Ready for the defendant.

The Court: Will counsel approach the bench, please?

(Thereupon, counsel approached the bench and the following occurred):

The Court: How long do you think this case will take?

Mr. Pittle: I think I can put our case on in two days but everything will depend on cross examination.

The Court: Well, this is an application for a permanent injunction?

Mr. Wiener: Yes, sir.

Mr. Pittle: It is on the merits

The Court: I just had an opportunity to read, and I am going to read again the decision of the Court of Appeals here.

Now, as you gentlemen know, I tried the contempt proceeding, and that is the case in which I found all three defendants not guilty, or acquitted them, or whatever you may wish to say.

Now, do you want to wait until Mr. McKevitt comes up here?

Mr. Pittle: Yes, sir.

3 The Court: Now, I was just going to ask, does either counsel have any objection to this Court trying this case?

Mr. Pittle: None whatever.

Mr. Wiener: No, sir.

The Court: Now is the time to say it.

Mr. Pittle: None whatever.

The Court: And you are familiar with the opinion I rendered in the case.

Mr. Pittle: Yes, sir.

The Court: And I have some knowledge of the case, having tried that.

Mr. Pittle: Your Honor, I want to emphasize, however, that the testimony at the contempt proceeding is irrelevant for the most part on the merits of the case because this goes back to the original matter before the alleged contempt occurred, and we think your knowledge would be helpful.

The Court: How do you feel about it?

Mr. Wiener: I certainly have no objection, Your Honor, as far as the contempt is concerned, but in our view, there is one and a single issue, and this is the issue of power and we will undertake to attempt to limit the proof to power and scope of relief, and if these matters are granted, why, then I don't think the trial will take more than a day.

The Court: I had an opportunity hurriedly to go
4 through the pretrial statement, and I notice in the issues of fact you have two:

Whether the Secretary had a reasonable basis for instituting administrative proceedings to suspend and terminate the plaintiff's contract:

And 2, whether the plaintiff has been guilty in the conduct of his duties under the attorney contract with the Tribe of overreaching or a violation of the high degree of confidence imposed upon him in fair dealing under the attorney-client relationship.

Those are the issues of fact. Then we have an issue of law.

Mr. Wiener: That is the Government's contention.

The Court: I understand.

Mr. Wiener: The issues are simply, in our view, if he had any power.

The Court: I think what we will do, I will exclude the witnesses who are going to testify, and I will ask you to make an opening statement telling me your theory of the case.

Mr. Wiener: Yes, sir.

The Court: And counsel for the Government, I will ask him to make an opening statement, and the same ruling for him.

Mr. Pittle: All right, sir.

The Court: I think what I might do in this case is
5 to call for the submission of briefs by both sides.

Mr. Wiener: We have them ready.

The Court: At the conclusion of the whole case and give you a week or ten days.

Mr. Wiener: We have the briefs ready.

The Court: Well, there may be some additional things you may have to brief.

All right, let us proceed.

(Thereupon, counsel resumed their places in the courtroom and the following occurred):

The Court: There will be a rule on witnesses on both sides.

The Deputy Clerk: Will all witnesses retire to the witness room until called?

(Thereupon, the witnesses left the courtroom.)

The Court: All right, Mr. Wiener.

OPENING STATEMENT ON BEHALF OF THE PLAINTIFF

Mr. Wiener: If the Court please, as Your Honor knows, this is the case of Littell vs. Udall, and action by the General Counsel and Claims Attorney of the Navajo Tribe of Indians under an approved contract to restrain the defendant, the Secretary of the Interior, from terminating that contract.

The basic facts are not in dispute, and they are set forth in the pretrial statement, and the only correction that needs
6 to be made in the pretrial statement, and I will mention it now for the record is that the vouchers which were mentioned in paragraph 13 on page 3 (a) of

that statement have been paid since the time that the statement was prepared and filed.

Basically, to recall the fact to your mind, Your Honor's mind, very briefly because Your Honor is familiar with the case generally, Mr. Littell, an attorney at law, practicing here in the District of Columbia was named General Counsel and selected by the Navajo Tribe as their General Counsel in 1947 for a ten-year term, and that contract was approved by the Secretary under Section 2103 of the Revised Statutes, 25 U. S. Code, 81.

When that contract expired, a new contract was negotiated between Mr. Littell and his client, the Navajo Tribe, and that contract was likewise approved by the Secretary under R.S. 2103, and a number of amendments were similarly approved.

And then in the summer of 1963, there arose a difference of opinion involving the plaintiff, the General Counsel, the new Chairman of the Navajo Tribal Council, and the Secretary.

I am passing over the details which are not too material here, but the Secretary undertook, first to suspend, and then to terminate the plaintiff's contract. The plaintiff filed the present action for an injunction, and it come on for hearing before Judge McGarraghy, who in November of 1963
7 issued a preliminary injunction, which had three paragraphs:

First, it restrained the Secretary and all his subordinates from terminating or suspending the plaintiff's contract:

Second, it enjoined the Secretary and all his subordinates from properly interfering with the Plaintiff's performance of his contract:

And third, it restrained the Secretary and his subordinates from interfering with the normal course of payment under R.S. 2104, a provision that was taken from forms of injunctions approved at least four times by the Supreme Court.

That injunction was appealed to the Court of Appeals, and in the Court of Appeals it was affirmed in an opinion with which Your Honor is familiar, which has now been reported.

The Court of Appeals, while not purporting to pass on the merits, because at that point it could not—and I have an extra copy, Your Honor, which may be more convenient.

The Court of Appeals did not purport to pass on the merits, and, of course, it could not because on an appeal from a preliminary injunction the only issue open is abuse of discretion. Nor could the Court of Appeals pass on the merits in a case where no answer had been filed. So it sent the matter back for trial.

The Secretary filed a motion for clarification and for rehearing, and in the motion for clarification, he said,
8 in substance: Well, under this opinion, which points out several times that there is no statute giving the Secretary the power to cancel or terminate a contract that he has once approved, there will be nothing to try.

And the Court of Appeals, after due consideration, denied that petition, and certiorari was not filed.

And therefore, in our view, the only issue open here is that of power, because if the Secretary had no power to do what he did, it is entirely irrelevant to inquire whether he had reasonable grounds for doing what he did, when he had no power to do it. Reasonable grounds would become material only if he had power to act in the premises at all.

And that is why, at page 5 of the pretrial statement, we indicated that in our view this trial should be limited to the issue of power, because if he had no power to act, and I am coming to the special defenses in a minute, but if he had no power to act, there is no use of going into justification, and there is no use of our going into prove the allegations of Paragraph 10 of the complaint, which say that these grounds were a subterfuge, that they were inadequate on their face, that they were mutually inconsistent with each other.

This would be in a sense a labor of love for us to prove that they were groundless, because if he had no power, we have no right to ask the Court to hear that contention. If he had no power to act, it makes no difference
 9 whether the grounds were good or bad.

Now, therefore, we propose to do the following, and by the way, if Your Honor wishes either now or at the appropriate time later on to have me argue the issue of power, we have found further statutory material, which was not before the Court of Appeals, which shows very plainly a statute which was not mentioned, which gave the Secretary the power to cancel, a power which has since expired.

So that specific congressional authority is requisite to cancel.

Therefore, what we propose to do is to put in the undisputed documents, which have already been before the Court, and round out the record by bringing in other documents, referred to in the basic documents, which did not get into the record on the preliminary injunction; and then rest, subject only to evidence on the scope of relief.

Now, as to the defenses, there are two other defenses, and what we propose to do, subject to Your Honor's direction, is to move to strike those defenses.

Now, if Your Honor prefers, I can indicate the grounds why we now—

The Court: Just generally, what are the defenses?

Mr. Wiener: The two defenses are failure to exhaust administrative remedies, which was presented, a defense that was presented to Judge McGarraghy and rejected by him,
 10 a defense that was presented to the Court of Appeals and rejected by the Court of Appeals, a defense which is utterly without substance, because there never was any administrative remedy.

The second defense is unclean hands. Now, that was never asserted here or in the Court of Appeals until the dissenting opinion in the Court of Appeals.

We think the fact that the Court of Appeals rejected the suggestion of unclean hands is dispositive of the matter here, but I am perfectly prepared to indicate to Your Honor why independently it is without substance.

It is without substance independently for two reasons if the defense of unclean hands, and as it is pleaded here, it is simply that the Secretary has made serious charges, Paragraph 5 of the defendant's second defense, and if the making of serious charges were to disable the wronged individual from judicial relief, then any administrative or executive officer could always enlarge his powers by the simple expedient of derogating the people he doesn't like before he takes action against them, that he has no power under the law to take.

But I can be more specific. Under the pleadings serious charges were made. The employee discharge cases, and there is a long line of them, Peters against Hobby, Service against Dulles, Petarelli against Seaton, and in all of those there were not only serious charges, but there were administrative findings made after the full panoply or
 11 whatever they did within the Department, a finding that the individual employee was disloyal, and that his retention was inimical to the national security, which certainly are serious charges.

Well, one of these people brought an injunction and the others brought actions for declaratory judgments, which, of course, are governed by equitable principles, and they were permitted to prevail because either the Secretary had no power to throw them out on the grounds that he did, or he followed the wrong procedure.

So that the making of serious charges is not such a fact as bars equitable relief and therefore at the appropriate time, I am going to move to strike those defenses.

Now, that will substantially shorten the trial. It will eliminate the need for witnesses. It will eliminate the need for this motion to quash the subpoena, which has been filed

today, because we would only have used those documents in rebuttal, they were not a part of our direct case.

It will, in other words, bring the matter down to what the defendant himself said in his motion for clarification to the Court of Appeals, namely, that if that opinion stands unrevised, there will be nothing to try, and I certainly agree, and I think this will dispose of the case very expeditiously, because all these other matters are completely irrelevant.

The Court: As I understand your statement, you in effect contend that it comes down to this, a question of law
12 for the Court to decide whether or not the Secretary of the Interior had the authority to suspend this contract involved in this matter.

Mr. Wiener: Yes, Your Honor.

The Court: You say that as a matter of law that he didn't have the authority, or legal authority to suspend that contract as he did, apparently.

Mr. Wiener: Yes, Your Honor.

The Court: And therefore, you say, it isn't necessary to go into these other matters?

Mr. Wiener: Yes, sir.

The Court: Does that summarize your statement?

Mr. Wiener: Yes, sir.

The Court: All right, let me hear from counsel for the Government.

OPENING STATEMENT ON BEHALF OF THE DEFENDANT

Mr. Pittle: May it please the Court: From the time of John Marshall and Andrew Jackson Indian tribes in this country have been considered dependent nations, and the courts have consistently characterized the relationship between Indian tribes and the United States as one of guardian and ward.

The relationship has been characterized also, or analogized, with the proposition that the Indians are in a state

of tutelage, with a view ultimately to becoming assimilated into our society and civilization.

13 Now, the matter of recognizing a tribe as such is a political matter for the concern of Congress.

Congress has delegated this function to the Secretary of the Interior. Congress has delegated further to the Secretary of the Interior the function of regulating all of the affairs of the Indian tribes so that its plenary power in the most part has been delegated, except as it has limited the Secretary's activities.

Now, the Navajo Tribe, which is involved in this litigation, is not an organized Tribe. It was not organized under the Wheeler-Howard Act, that is the Act of June 18, 1936, otherwise known as the Indian Reorganization Act, and provides that tribes may by forming an organization adopt a constitution, by-laws, and receive a corporate charter.

They may then engage in corporate activities and may be sued and may sue to some extent relating to their official tribal functions and particularly the corporate functions.

Now, the Navajo Tribe has never been organized. Their government as presently constituted consists of a Tribal Council of 74 members, who are elected by the popular vote of the Navajo people.

There are approximately 104,000 Navajos on a reservation which consists of about 24,000 square miles of land. Out of this 104,000 Navajos, there are approximately thirty to thirty-five thousand registered voters, and these
14 voters meet in election districts, not dissimilar to congressional districts within the State and elect the members, their representatives to the Tribal Council.

One thing that must be kept in mind is the fact that the members of the Tribal Council, a very large number of them, do not even speak English fluently. They are great orators of the type of the old West and get up in the Tribal Council and make speeches. Many of the Council discussions and debates are carried on in the Navajo language.

The Government of the United States usually represents the interests of Indian tribes and furnishes legal assistance, as well as schools, hospitals, and the like.

However, it was early recognized that conflict of interest might arise by virtue of treaty violations and violations of agreements, and thereby Congress authorized the employment by the Indian tribes of private attorneys and agents under the statute which has been referred to, 25 U.S.C. Section 81.

This provides in substance that no attorney or agent's contract shall be valid unless in writing and approved by the Commissioner of Indian Affairs and the Secretary.

Now, it is true that the plaintiff in this case was retained under the contract, which was so approved. This contract originally was executed in August, 1947, and it contained the provision that it would extend for ten years.

15 Upon expiration of the contract in August, 1957, it was continued in this fashion.

The contract, however, is rather unique in that under this one document, the plaintiff was employed or retained as both Claims Attorney and as General Counsel for the Tribe.

With respect to his duties and functions as General Counsel, he was to receive a fixed annual retainer, and he was obligated to perform what I would suppose would be general legal services.

With respect to claims, which we will demonstrate are defined in the contract and other documents, to refer to claims against the United States of America by the Navajo Tribe, and not any particular lawsuit the Indians might happen to have against somebody else, he was to receive a percentage of the recovery, up to 10 per cent of the value of the property recovered or protected for the Indians.

When this contract terminated in 1957, a new contract had not been prepared and so it was extended by an interim agreement, and a new contract was negotiated and drafted, and it was approved retroactively in November of 1957, retroactive to August of 1957.

The new contract likewise extends for a period of ten years. There were certain important changes in this new contract.

16 The new contract, of course, was approved by the Commissioner and the Secretary, and there have been, or up until the time of this litigation, there have been 11 amendments to this contract all of which similarly have been approved by the Secretary of the Interior or the Commissioner. When this litigation started in the winter of 1963, it was preceded by this situation: The election campaign of March of 1963, under which Mr. Raymond Nakai was elected Tribal Chairman apparently was the cause for bitter differences and opinion among the Indians.

There were three candidates in this campaign. One of them was Paul Jones, the former Chairman, who was running for reelection as Tribal Chairman; and another was Sam Billison; and the third was Raymond Nakai.

Now, at this point I might mention that the Chairman of the Tribal Council is the executive officer of the Tribal government. Up until October of last year, the Chairman was assisted by an Advisory Committee, which consisted of nine members of the Tribal Council, selected by the Chairman.

By resolution, in October of this past year, the Advisory Committee was reorganized. It now consists of 18 members elected by the Tribal Council.

Now, in this campaign of March, 1963, both candidates Ballison and Nakai, who were running against the candidacy of Paul Jones, ran on a platform pledged to terminate the contract of their General Counsel, because they
17 both charged in campaign speeches and in literature, and otherwise perhaps, that in their opinion the General Counsel was interfering in the internal affairs of the Navajo Tribe far above the scope of his responsibility and his duties as General Counsel. He not only was acting as the lawyer for the Tribe; he was in effect the Chief of the Tribe.

This caused the differences of opinion.

Now, Nakai was elected the Chairman in March of 1963. He was inaugurated into office in April, 1963, and the relationship immediately broke down between the Tribal government, the Chairman, and the Legal Department of the Tribe. We will show how there was a lack of cooperation between these parts of the Tribal government right after the election.

Now, as Mr. Wiener has said, and as Your Honor knows because of your familiarity with previous proceedings in this matter, in November of 1963 the Secretary of the Interior wrote a letter to the plaintiff informing him that serious charges had been placed against him by officials of the Tribal government.

The Court: May I interrupt just a moment? Maybe I learned this during the contempt proceedings, I am not sure, but what was the nature of the charges that the Secretary set forth?

Mr. Pittle: They are principally three charges, first, that the plaintiff had violated the high degree placed
18 upon him as the attorney for the Tribe.

The Court: Did they go into any detail?

Mr. Pittle: He gave the specifics, and he requested, in a very lengthy letter, the answer to a number of questions relating to the individual charges.

The charges principally are these: First, that the plaintiff has been guilty of misconduct, overreaching, if not worse, in having amendments to the contract put through without full disclosure to the Tribal Council.

I will explain how this was done. That these amendments increased his salary in violation to a prohibition in the 1957 contract; that, of course, the Tribal Council approved it, but the Tribal Council was not informed of the restriction when it approved it.

Second, we will prove, and the charges were of the Secretary, that the plaintiff had been guilty of using General Counsel attorneys on the legal staff to assist him in claims

work. This would be at the expense of the Tribe but for the benefit of the plaintiff because the contract specifically required the plaintiff to pay for legal assistants on claims out of his own pocket.

And that this is no small matter. We will show the extent of it as best we can, but it will be considerable.

And third, on Amendment No. 11, there was a resolution adopted by the Tribal Council which authorized only
 19 two things, it authorized an amendment to the contract to employ an additional attorney and to increase the compensation of one on the staff. That was the authorization by the Tribal Council.

The Tribal Council in that same resolution authorized the Tribal Chairman, Paul Jones, to execute the appropriate amendment when it had been prepared.

The plaintiff prepared the amendment, and not only did it include the provision for retaining the additional attorney and raising the compensation for the other one, but he slipped in one little matter which changed the category of the case of Healing against Jones, which the Court of Appeals talks about in a footnote to its opinion, erroneously, I might say, and he included that so that its category would be changed from general litigation to a claims case, and the plaintiff would receive instead of his ordinary annual retainer for handling that case along with the other legal business, additional compensation of 10 per cent of the value of the property recovered, or one per cent of the minerals.

One way of characterizing this might be, that the plaintiff would now be entitled, under some theory, I suppose, to 93,000 acres of land. But this was not disclosed to the Tribal Council. Of course, it was mentioned. It was mentioned in many debates that Healing against Jones was a claims case.

The plaintiff explained at great length how wonderfully
 20 well he was doing in prosecuting this claim, but it was never explained to these, as far as English is concerned, many illiterates, that this matter had been

This caused the differences of opinion.

Now, Nakai was elected the Chairman in March of 1963. He was inaugurated into office in April, 1963, and the relationship immediately broke down between the Tribal government, the Chairman, and the Legal Department of the Tribe. We will show how there was a lack of cooperation between these parts of the Tribal government right after the election.

Now, as Mr. Wiener has said, and as Your Honor knows because of your familiarity with previous proceedings in this matter, in November of 1963 the Secretary of the Interior wrote a letter to the plaintiff informing him that serious charges had been placed against him by officials of the Tribal government.

The Court: May I interrupt just a moment? Maybe I learned this during the contempt proceedings, I am not sure, but what was the nature of the charges that the Secretary set forth?

Mr. Pittle: They are principally three charges, first, that the plaintiff had violated the high degree placed
18 upon him as the attorney for the Tribe.

The Court: Did they go into any detail?

Mr. Pittle: He gave the specifics, and he requested, in a very lengthy letter, the answer to a number of questions relating to the individual charges.

The charges principally are these: First, that the plaintiff has been guilty of misconduct, overreaching, if not worse, in having amendments to the contract put through without full disclosure to the Tribal Council.

I will explain how this was done. That these amendments increased his salary in violation to a prohibition in the 1957 contract; that, of course, the Tribal Council approved it, but the Tribal Council was not informed of the restriction when it approved it.

Second, we will prove, and the charges were of the Secretary, that the plaintiff had been guilty of using General Counsel attorneys on the legal staff to assist him in claims

work. This would be at the expense of the Tribe but for the benefit of the plaintiff because the contract specifically required the plaintiff to pay for legal assistants on claims out of his own pocket.

And that this is no small matter. We will show the extent of it as best we can, but it will be considerable.

And third, on Amendment No. 11, there was a resolution adopted by the Tribal Council which authorized only
19 two things, it authorized an amendment to the contract to employ an additional attorney and to increase the compensation of one on the staff. That was the authorization by the Tribal Council.

The Tribal Council in that same resolution authorized the Tribal Chairman, Paul Jones, to execute the appropriate amendment when it had been prepared.

The plaintiff prepared the amendment, and not only did it include the provision for retaining the additional attorney and raising the compensation for the other one, but he slipped in one little matter which changed the category of the case of Healing against Jones, which the Court of Appeals talks about in a footnote to its opinion, erroneously, I might say, and he included that so that its category would be changed from general litigation to a claims case, and the plaintiff would receive instead of his ordinary annual retainer for handling that case along with the other legal business, additional compensation of 10 per cent of the value of the property recovered, or one per cent of the minerals.

One way of characterizing this might be, that the plaintiff would now be entitled, under some theory, I suppose, to 93,000 acres of land. But this was not disclosed to the Tribal Council. Of course, it was mentioned. It was mentioned in many debates that Healing against Jones was a claims case.

The plaintiff explained at great length how wonderfully well he was doing in prosecuting this claim, but it
20 was never explained to these, as far as English is concerned, many illiterates, that this matter had been

slipped in in excess of the authorization of the Tribal Council. And we will prove these charges.

Those were the charges in the Secretary's letter. And they were never answered. Instead, plaintiff brought this action.

But I think I would like to fill in a couple of little details before we get to that, if I may.

Upon the election of Nakai as Chairman of the Tribe, both before and after his inauguration, he looked into the matter of terminating the plaintiff's contract.

In June of 1963, the Advisory Committee adopted a resolution requesting the Secretary of the Interior, "to audit, investigate, and terminate." the plaintiff's contract.

When the Secretary of the Interior received that resolution, he didn't pay too much attention to it. You will hear the full story on that when we put on our evidence. The reason was that he thought this was just a result of the bitterness flowing out of the previous election.

But there were many meetings and discussions, and in August, 1963, the Chairman addressed a letter to the Secretary requesting him to take action on the resolution.

Upon the receipt of the letter, the Secretary directed the Solicitor to look into this situation. The Solicitor
21 investigated the matter by looking over the documents on file in the Department of the Interior relating to the contract and all the amendments. At that time, that is when it was learned that these matters had not been fully disclosed to the Tribal Council.

At that time it was learned the plaintiff had been using General Counsel attorneys on claims services in violation of the provisions of the contract.

Now, granted that Interior should not have approved these contracts had they known these things, or might not have approved them, or should not have, had they known these things before, the fact is that upon learning of them they attempted to rectify what was obviously their remission.

So that now we come to the present action. It is true we took an appeal from the interlocutory injunction but as the Court of Appeals has pointed out in his opinion, although it states that they have been shown no statutory authority conferring upon the Secretary —

The Court: What page are you referring to?

Mr. Pittle: Page 7 of the slip opinion, I believe.

It states: The Secretary can point to no statute applicable here which confers upon him any such authority, that is, to terminate the contract.

And then on page 10, about the middle of the page, the paragraph beginning there:

22 We are persuaded that the Solicitor correctly recognized that the Tribe was the client and the Tribe could terminate the contract but not the Secretary.

Then in the very next paragraph: We voice no opinion on the merits. We say only that the issuance of the preliminary injunction in this unique situation was a matter addressed to the sound discretion of the Trial Court.

They find no abuse of discretion and they make note that the District Court clearly contemplated the Secretary simply lacked authority to terminate the contract in the manner attempted.

The injunction is surely temporary in terms, and in effect is operative only "until the further order of the District Court and pending final hearing of this cause."

Since a full trial is available, we refrain from comment on the possible applicability of 25 U.S.C. 82.

Now, Section 82 is the section which authorizes the Secretary to approve vouchers. In fact, it is more imperative than that. It provides that no money or thing of value shall be paid to an attorney or agent under any contract except by vouchers submitted for his approval.

So that upon the affirmance by the Court of Appeals of the issue in the preliminary injunction, it is quite obvious that they have not passed upon the merits. We have not filed an answer. We have not asserted any defenses, and

23 the only thing that was before the Court on the motion for a preliminary injunction were the affidavits and letters and documents, which contained nothing but self-serving statements in support of the preliminary injunction.

I say further that they contain gross misstatements of fact, if not actual inaccuracies, and we are attempting by competent evidence to prove these misstatements and misassertions and self-serving statements.

In response to one of the matters suggested by Mr. Wiener, that there is nothing to do, but just make the injunction permanent, because the Court of Appeals said the Secretary lacks authority should point out that there is a great deal to consider.

One of the most important things is the wording of the final injunction. As Mr. Wiener has pointed out, the preliminary not only enjoined the Secretary from suspending or terminating, but it prohibited him from stopping payment in due course of the vouchers for the retainer of the attorney's contract, and it prohibited him from interfering with the plaintiff's, or improperly interfering, with the plaintiff's contractual relationship.

Well, that provision is what gave rise to the contempt proceeding before Your Honor last spring, the question of what is improper interference.

24 By virtue of the Secretary's supervisory authority over Indian affairs, he must be allowed to continue to supervise the performance under a contract and to make sure that the Indians are getting what they are supposed to be paying for and any time he goes out and consults and confers with a group of Indians who may not be of the same political faith as the General Counsel in Tribal affairs, then that will give rise to another charge of contempt for violating the injunction.

In our answer we have asserted as defenses, that the Secretary must have the continuing power of supervision, and that his attempt to terminate was not unreasonably

exercised, and most important is the charge that he has been guilty of overreaching and unfair dealing with his clients.

We are prepared to argue at the appropriate time that any attorney owes to any client a very high degree of trust and fair dealing and disclosure, and an attorney who represents a tribe of Indians who are still in a state of tutelage has a greater burden of making complete and full disclosure as to what his activities are resulting in.

We cannot overemphasize the fact that the proceeding that your Honor heard with relation to the contempt last spring has nothing whatever to do with the matter before you at this time. The events which formed the basis for the charge of contempt occurred after the Secretary's order and after the preliminary injunction.

25 And since we have filed an answer, asserting unclean hands, we are entitled to establish that for these reasons:

That just because the Court of Appeals may be correct, and we are not prepared to admit that, when it held that the Secretary lacked authority in this unique situation to terminate the contract in the manner attempted, it does not necessarily follow that the plaintiff is entitled to his injunction.

The plaintiff is coming into this Court in equity. He is asking equitable relief. If he has been guilty of unclean hands, this is a matter of hornbook law, he is not entitled to an injunction.

Now, how will this help the Secretary?

The Court: I have a question. Have you finished? I don't want to interrupt you.

Go ahead and finish.

Mr. Pittle: Even though the Secretary may lack authority, it is still important to hear the facts and determine whether the plaintiff is entitled to injunctive relief, so that we will avoid arguments in the future, in the event vouchers for payment under his contract should be disallowed be-

cause of the Secretary's then decision, maybe to be made in the future, that the performance has not been in accordance with the contract provisions.

The Court: The question I had in mind was this: The first thing is that you have two questions in this case.

26 First, whether or not the Secretary of the Interior had statutory authority to suspend the contract, which would be, I think, a question of law.

Mr. Pittle: That is right.

The Court: Purely a question of law, regardless of the facts in the case. Then you have the question whether or not the facts warranted his doing what he did in this case of suspending the contract.

Now, what do you think of this suggestion? And I mention this purely by way of suggestion in order to shorten this trial. To give the plaintiff leave to amend and file a motion for summary judgment based solely on the question of law involved, and hear that first, and have counsel submit briefs in connection with that motion.

Then if the Court should decide that the only question involved in the case is a question of law, that is, whether or not under the circumstances and facts in the record the Secretary has the legal authority to suspend the contract, and if I decide that he didn't that would conclude the matter. Then you could take an appeal from that and have the Court of Appeals pass on that. If I decide that I should hear the evidence in the case, and withhold that decision, then we would have a trial on the merits.

What do you think of that suggestion?

27 Mr. Pittle: I can't agree with Your Honor's suggestion. I can't agree to it for this reason: That we would then be, after a decision on the motion for summary judgment against us, we would be in the same position in the Court of Appeals that we are now, it still would not have heard the merits.

The Court: I know, but the Court of Appeals would only be called upon to decide a question of law, regardless of the merits of the case or the evidence.

Mr. Pittle: The Court of Appeals seemingly thinks it decided that issue adversely to us, when it stated, if you wish, to characterize it by way of dictum, that the Secretary lacks the authority.

But for the purpose of responding to Your Honor's question only, even assuming that the Secretary does lack the authority, and even assuming that is correct, we contend that the plaintiff is not entitled to injunctive relief permanently for the reason that I have said.

The Court: Because he is not coming in with clean hands?

Mr. Pittle: That is right, and my argument now is that we are entitled to our day in court to prove it.

The Court: It might in the long run save time to try the whole case.

Mr. Pittle: We have brought witnesses here from Window Rock, 2,500 miles away, and they are in Court ready
28 to testify now, and to send them back and await a decision, and bring them back again, I think the whole case should be put on undoubtedly, and then you can consider all the things, and then if it goes back to the Court of Appeals, they will have the merits in front of them.

The Court: And they will have the whole record?

Mr. Pittle: Yes, sir. One final thing, if I may, sir

The plaintiff has charged that the attempt to terminate the contract and the charge of unclean hands, and so forth, was a mere subterfuge.

Now, you have heard testimony, and you have seen the record, and you will note that the charges have been made that this is a vendetta, a personal vendetta between the Secretary of the Interior and the General Counsel for the Tribe.

We will show there is no basis for that whatever, that the charges are not subterfuge, that the Secretary had no interest whatever in replacing the General Counsel with a Mr. Schifter and a Mr. Barry DeRose, who it is alleged are his personal friends.

The charge has been made that Barry DeRose is the

Secretary's personal friend and a campaign manager. We will have the eyewitness, word-of-mouth testimony of Mr. DeRose that this is not so. And we will show the facts relating to why the plaintiff thinks so.

29 This charge is completely without foundation, the fact that it is a subterfuge and exists only in the mind of the plaintiff and we will establish it. Thank you.

The Court: Well, Mr. Pittle, I note on page 10 of the slip opinion that the Court of Appeals, speaking through Judge Danaher, said this: We voice no opinion on the merits. We say only that the issuance of a preliminary injunction in this unique situation was a matter addressed to the sound discretion of the Trial Court, citing the case of *Alabama vs. United States*.

Then it continues: We find no abuse on this record. We may note that the District Court clearly contemplated that the Secretary simply lacked authority to terminate the attorney contract in the manner attempted and to rescind his earlier approval of the contract and the amendments thereto. The injunction is surely temporary in terms, and in effect is operative only "until the further order of the District Court and pending final hearings of this cause." We need not spell out additional details covered by the District Court's order designed in part, at least, to preserve the District Court's jurisdiction. Since a full trial is available, we refrain from comment on the possible applicability of 25 U.S.C. 82.

All right, I will hear you, Mr. Wiener, and then make a ruling.

30 Mr. Wiener: If the Court please, the irrelevancies and the charges of fraud labeled against a reputable lawyer which Mr. Pittle has made convinced me more than ever that this trial must and should be limited to the question of power.

I started out by talking about the Navajo election two years ago in April, 1963, and various candidates who said they objected to what Mr. Littell is doing.

Now, since when, and let us assume that Mr. Nakai had been overwhelmingly landslide elected, which he wasn't but let us assume that he had campaigned on getting rid of Littell and had been overwhelmingly elected? Would that for a minute give the Secretary power to cancel the contract?

Would that for moment give Mr. Nakai the power to cancel the contract, when, as Solicitor Barry advised the Secretary in October, and as Judge Danaher pointed out in the Court of Appeals that the governing body was the Council, and the only body that was free to cancel was the Council, not the election returns. You cannot cancel a contract by holding an election.

Now, then, this is also irrelevant under the pleadings. The Secretary purported to act on two memoranda by Mr. Barry, dated 1 November. They are in the record, they will be when we put in our evidence.

And then Paragraph 9 of the answer, by the defendant that those were the grounds he acted on. Now, there is nothing in there either about the Navajo election or whether

Mr. DeRose was or was not Congressman Stewart
31 Udall's campaign manager before he was appointed to the Cabinet.

Thereafter, Mr. Pittle proceeded to repeat contention that had already been rejected by the Court of Appeals, and lest Your Honor think for a moment that my indignation over the groundless attack on my client has led me into an excess of advocacy, I will read the section headings from the defendant's brief in the Court of Appeals.

He had one point in his brief in chief, which read: The Secretary of the Interior has power under appropriate circumstances to withdraw his approval of a contract of an attorney with an Indian tribe.

And under that he has five subheadings:

A, The issue here is the power of the Secretary to act under any circumstances;

B, The Secretary has been given complete power to supervise and regulate all Indian-white relationships, except as expressly limited by Congress;

C, The Secretary's power embraces supervision of relations of attorneys with Indian tribes, including investigation of their activities, and taking appropriate corrective action;

D, Congress has confirmed the Secretary's authority in broad terms to supervise all details of the attorney's relationship with Indian tribes;

32 E, Any remaining doubts disappear when the principle of construction of the statutes favorably to the Indians is applied.

Well, passing the point of whether it is construing a statute favorable to the Indians if you deprive them of counsel of their own choice, it is obvious that all of those contentions were squarely rejected by the Court of Appeals.

Now, we get to the Secretary's reply brief. He repeats the points I have already read, and then he says: Appellee's other contentions do not justify confirmation of the injunction order.

A, The injunction cannot be justified as an exercise of discretion if the Secretary was acting within the scope of his statutory power and duties.

B, Neither the approval of appellee's contract, nor approval of the Navajo Tribal Code, waived or relinquished the Secretary's duty to supervise appellee's performance as attorney for the Tribe or to withdraw his approval of the contract.

C, Appellee's charges of bad faith by the Secretary were rejected by the Trial Court and cannot justify the injunction issued.

That referred to the fact that when we argued subterfuge in the Court of Appeals, the Secretary pointed out that

Judge McGarraghy had made no finding on it and had restricted himself to power.

33 D, Appellee's argument that the Court has here enjoined tortious conduct is premised on acceptance of the lack of secretarial authority contention.

E, Appellee has an administrative remedy.

F, Appellee seeks in effect a whitewash before the facts are determined.

Well, then came the opinion, which has been quoted from, there is no power, and then came this petition for reconsideration, in which the Secretary said in part, by merits and full trial the opinion might have meant examination of adequacy of the reasons given for the action of the Secretary.

But if the Secretary lacked power to rescind approval for any reason, the adequacy of his reasons would seem to be irrelevant.

Now, if we go into the adequacy of the reasons, we have this, which has already appeared in the record. In the first place, the same Mr. Barry who in October advised that the Secretary was limited to recommending termination to the Tribal Council did a flip flop, and on the 1st of November said: You may cancel the contract on the basis of what we have.

And there is no explanation in the second memorandum why Mr. Barry considers his first conclusion unsound. It wasn't unsound, and the Court of Appeals adopted it.

Then came the business, which I am sorry to hear
34 Mr. Pittle has resurrected, that the plaintiff had constantly increased his own salary. Well, now, if the Court please, poise is likely to be lost in contemplating that contention at this time on the record already made.

The final increase to the plaintiff's present salary was personally approved by the defendant Stewart L. Udall with a finding that it was in the best interest of the Indians,

and that is in the record, and I say that to charge that as an over-reaching is as spurious as the proverbial three-dollar bill.

Now, Mr. Pittle I think went over the line when he said, Mr. Littell slipped something in the contract. If we go into the matter, I can demonstrate to the hilt that naming Healing vs. Jones as a claims case was not only what Mr. Barry's predecessor had held but that Mr. Barry himself examined and approved Amendment No. 11 before it was approved by the Secretary, and that is admitted in the pretrial statement.

But Mr. Barry, later in these November memoranda, when he claimed that the Amendment 11, that he had earlier approved was the ground for canceling the contract, as though one invalid amendment were grounds for canceling all the rest but when Mr. Barry said that Healing vs. Jones is not a claims case, he slipped something out, and he slipped out the opinion in 174 Federal Supplement in which the Navajo Tribe had to fight the United States in order to start the case of Healing vs. Jones rolling, and that citation, which appears nowhere, and which was
 35 slipped out of Mr. Barry's memorandum, was relied on by Judge Danaher to show that, of course, it was a claims case.

And then there are two inconsistencies in the grounds given. First, Mr. Barry said, and that means the Secretary said, because the Secretary adopted it, the Secretary said: First, he has over-reached by receiving a salary that I said he was entitled to in the best interests of the Indians.

Then, second, Healing vs. Jones is not a claims case; and third, he has used General Counsel attorneys on Healing vs. Jones.

Well, if Healing vs. Jones is not a claims case then it was perfectly proper to use General Counsel attorneys on it.

If we have to go into this elaborate business, which will take a great deal of documentation, and waste a great deal of Your Honor's time, it will be shown that Healing vs.

Jones started out as a General Counsel case and later became a claims case, and the same is true of other cases.

And then there is this further feature, that in the October memorandum—in the November memorandum, the Secretary said the use of claims attorneys on Healing vs. Jones is grounds for canceling the contract, but there, as in other respects, the October memorandum presented to the Secretary by Mr. Barry was different.

He said that if the plaintiff has improperly used
36 General Counsel attorneys on Healing vs. Jones claims matters, then his compensation for Healing vs. Jones when it is eventually payable, is subject to an offset. He didn't say anything about cancellation then.

Well, that is not the issue here because there is no claim made for compensation on Healing vs. Jones, and the only compensation the plaintiff ever sought to have protected here was compensation under the contract.

So we say that in order to avoid all of this irrelevancy, and my goodness gracious, to go into the question of Mr. DeRose's relationship to the Secretary, we might as well inquire about—what has that got to do with the Secretary's power to cancel? So that I think it would be a very fine suggestion to move for summary judgment.

And what I would like to do, after I have put in a case in chief, as I have indicated, and I think we can all agree we will defer the issue of scope of relief, would be to make a motion for summary judgment, and couple it with a motion to strike the two defenses as inadequate, because this unclean hands defense is a gambit, it is another three-dollar bill. It has been rejected by the Court of Appeals.

I don't think, quite frankly, that Your Honor could properly proceed, after the Court of Appeals has spoken, to proceed to all these bypasses and irrelevancies and congenial controversies that Mr. Pittle has suggested
37 he would like to explore.

So that I am perfectly prepared at the close of our direct case, to move a motion, to be followed later and

submitted in writing, but I will make the motion orally at this time, and we have the points and authorities all ready, a motion for summary judgment coupled with a motion to strike the two defenses, and that will make it a very simple case.

And just because counsel, my brethren, has an erroneous view of the law, and an erroneous interpretation of the Court of Appeals and spent public funds to bring witnesses, and I don't care if they brought them 5,000 miles, if they brought them from Guam or Midway, is no reason why that has to be heard, because they could have taken depositions long ago if they were relevant and as a matter of fact, Your Honor, we had the pretrial order, and I think it is dated the 23d of November. It provided that if further witnesses were to be brought the parties would give prompt notice of it.

This trial date was set back in December, shortly after the pretrial, and on the 26th of January, less than a week before trial, we get a list of four more additional witnesses from 2,500 miles away.

Well, now, I don't think that is any way to try a lawsuit and certainly it is not grounds for hearing their irrelevancies.

38 If every statement in Mr. Littell's affidavit that the defense does not like has got to be contradicted in extenso, and if every statement in the affidavits that were submitted in opposition, which I plan to offer as part of the record, that we didn't like had to be contradicted, good Lord, we would be here until Easter. And that is why I propose to do this.

The Court: Do you want to reply, Mr. Pittle?

Mr. Pittle: Not extensively, Your Honor, but I just want to point out that the unclean hands defense was not rejected by the Court of Appeals because it never considered it. There was no defense raised at that time.

The statement about the relationship between Mr. DeRose and the Secretary of the Interior was injected by the plain-

tiff, and we didn't bring that statement, and that is the basis for the plaintiff's charge of subterfuge.

We are entitled, I submit, to our day in court to disprove the affirmative allegations in the complaint on which the plaintiff bases his claim for injunction and to prove our affirmative defenses in our answer, which show that even if the allegations in the complaint are not entirely wrong, he is still not entitled to injunctive relief.

Now, the motion for summary judgment, I was quite surprised that the plaintiff didn't file that six months ago if he wanted to test the issue of law, and we are led to believe

that we are going to have a trial on the merits, and
39 on the basis of that proposition, we have prepared to try it.

And I submit that ultimately that is what is going to happen anyway.

The Court: Well, I think we will take our morning 15-minute recess now.

(Thereupon, a short recess was had.)

Mr. Wiener: If the Court please, I offer as Plaintiff's Exhibit A the joint appendix—

The Court: Wait a minute. I haven't decided yet whether I am going to hear the case on a question of law first or whether I am going to have to hear the case on its merits.

Mr. Wiener: Well, this would be our proof on the supplementing question of law. We would have to put this in. Even on our restricted view of the case, Your Honor, we would have to put in these exhibits that I am now about to offer.

The Court: Very well. What are the exhibits?

Mr. Wiener: Exhibit A are pages 10 to 345 of the joint appendix of the prior appeal, No. 18,338 in the Court of Appeals. I offer this, and I think I better summarize it for the record.

This starts with Mr. Littel's affidavit. It has the contract, his two contracts, all of the amendments, and all of the authorizing resolutions, and excerpts from the Navajo

Legal Code, his report as General Counsel, certain affidavits, and telegrams.

40 Then the covering letter from the Secretary to Mr. Littell enclosing the October memorandum by Mr. Barry, the one where his views are in accord with those of the Court of Appeals, and the suspension letter with two other memoranda, and then the letter from the Secretary telling the Chairman what he had done.

Then Mr. Zimmerman's affidavit with his exhibits.

Mr. Nakai's affidavit, and Mrs. Whipple's affidavit about the search of the files, and Mr. Littell's further affidavit, down to but not including the preliminary injunction.

I offer this in evidence under the stipulations entered into at the pretrial and that are covered in the pretrial order, and some of these are items that the defendant listed, and some that the plaintiff listed, and it was agreed that these affidavits would go in without further cross examination.

The Court: Any objection to that?

Mr. Pittle: I have no objection to the documents as exhibits, but I don't recall an agreement that it should go in without further cross examination, because I propose to impeach many of the statements in the affidavits and the letters.

Mr. Wiener: All right.

Mr. Pittle: And I expect to contradict them, but I have no objection to it.

41 Mr. Wiener: It is stipulated, and this is the pretrial order, that the following may be admitted without former proof of authenticity, subject to all other objections: All documents listed on the plaintiff's pretrial statement.

One of those is that the affidavits contained in the joint appendix may be admitted in evidence without further cross examination, subject to objections as to relevancy and materiality.

The Court: Do you object on the ground of relevancy and materiality?

Mr. Pittle: No on the grounds of relevancy and materiality, but certainly I didn't understand that I would not be permitted to impeach and contradict self-serving statements in the affidavits.

Mr. Wiener: If he can contradict them. Well, as long as this goes in, I don't want to carry on. This is Exhibit A.

The Court: He will get an opportunity, if it becomes necessary, to do that.

(The document was marked Plaintiff's Exhibit A for identification, and was received in evidence.)

The Court: Well, now, this is the way this matter looks to me. If I hear the case simply on the question of law first, and if I should decide, after hearing both sides and considering the briefs, that the Secretary did not have
42 the legal authority under any circumstances to revoke or rescind his contract, then if that goes to the Court of Appeals, and the Court of Appeals rules with me, and decides that I was right, that should end the matter.

Mr. Wiener: Yes, Your Honor.

The Court: On the other hand, if the Court of Appeals should say, upon an appeal under those circumstances that Judge Sirica should have heard the evidence to determine whether or not, as I think Government counsel indicated, whether or not the plaintiff did come into Equity Court with clean hands, and whether or not I should have made findings of fact regarding those issues, don't you see?

This is what I think Mr. Pittle argues; correct?

Mr. Pittle: That is correct, Your Honor.

The Court: This is one of your defenses, that you claim the plaintiff did not come in with clean hands, and therefore he is not entitled to equitable relief by way of a permanent injunction.

That is my understanding of your argument.

Mr. Pittle: That is correct.

The Court: And that changes the situation, don't you see?

Mr. Wiener: Well, what I propose to do, Your Honor, is this: I propose to argue at any point that Your Honor

43 considers convenient, that there is no power, and I will start with the Court of Appeals opinion, but I have more material. But in order to make my evidentiary case, I have got to put in these documents.

I also propose to argue, after I have finished with these documents, I am going to move to strike the two defenses, and I have memoranda on those, and I have the other memorandum, and both of the defenses, or one of the arguments on the defenses is going to be that they are both foreclosed by the Court of Appeals opinion, but at this time all I am doing is putting in what I would need if Your Honor went right down the line with me on all of my legal contentions.

The Court: Well, let me make this statement: There is considerable merit to what the Government counsel stated, Mr. Pittle, and there is considerable merit to your argument. It is difficult for me at this time to decide which course to follow.

Why cannot we go ahead with the trial and at the appropriate or proper place in the proceedings, if you feel that you have made your case, and if you feel that you can move for summary judgment, I can always permit the pleadings to be amended, if I think they should be, and then I can make a decision at that time.

I would like to hear some more discussion about that. Is there any objection to that procedure?

Mr. Pittle: No, I am not.

44 The Court: I may decide during the trial that in order to save time, if you get into a mud-slinging contest in this case, I mean, I might decide that the only thing necessary to decide is a question of law, I don't know, but I am not going to make any statements that are binding.

Mr. Pittle: I have a good reason why, and I believe that just because the Court of Appeals may have decided the issue of authority, it does not necessarily have to follow that the plaintiff is entitled to relief.

The Court: I understand that is the argument you made, and I just mentioned it, and this would involve a trial on everything involved.

Mr. Wiener: That would involve a trial of every bit of irrelevant gossip that can be brought 2,500 miles.

Mr. Pittle: I am going to object to that characterization.

The Court: I am not going to be influenced by the remarks of counsel.

All right, let us proceed then.

Mr. Wiener: Very well.

As Plaintiff's Exhibit B, and solely for the convenience of the Court, I offer a copy of the slip opinion so that we have it in the record.

The Court: Very well. That is received. That is the opinion of the Court of Appeals.

45 (The document was marked Plaintiff's Exhibit B for identification and was received in evidence.)

Mr. Wiener: As Plaintiff's Exhibit C, again for the convenience of the Court, I offer a copy of the petition of the Secretary for rehearing and for clarification of the opinion filed in the Court of Appeals, which was Exhibit 15 at the clarification hearing, on the motion for clarification.

Mr. Pittle: No objection.

The Court: It is received.

(The document was marked Plaintiff's Exhibit C for identification and was received in evidence.)

Mr. Wiener: As Plaintiff's Exhibit D, I offer for the convenience of the Court, and it is within the realm of judicial notice, Title 2, Section 284 of the Navajo Tribal Code. This is the only section that is not in the joint appendix.

Mr. Pittle: No objection.

The Court: It is received.

(The document was marked Plaintiff's Exhibit D for identification and was received in evidence.)

Mr. Wiener: As Plaintiff's Exhibit E, Your Honor, I offer a resolution of the Navajo Tribal Council, dated January the 8th, 1960, and numbered ACJA-5-60, which was Plaintiff's Exhibit F at the pretrial, 5-F at the pretrial conference.

46 The Court: Any objection?

Mr. Pittle: No objection.

The Court: It is received.

(The document was marked Plaintiff's Exhibit E for identification and was received in evidence.)

Mr. Wiener: As Plaintiff's Exhibit F, I offer a copy of a letter from the Navajo Tribal Chairman, Paul Jones, to Secretary of the Interior Fred A. Seaton, dated 25 August, 1960, subject Navajo Claims, Claims Attorney Contract, and this was Plaintiff's 5-N at the pretrial.

Mr. Pittle: No objection.

The Court: It is received.

(The document was marked Plaintiff's Exhibit F for identification and was received in evidence.)

Mr. Wiener: As Plaintiff's Exhibit G I offer a copy of a letter from Solicitor Theodore F. Stevens, of the Department of the Interior, addressed to Mr. Paul Jones, Chairman, Navajo Tribal Council, dated November 15, 1960, which was Plaintiff's 5-O at the pretrial.

Mr. Pittle: No objection.

The Court: It is received.

(The document was marked Plaintiff's Exhibit G for identification and was received in evidence.)

47 Mr. Wiener: As Plaintiff's Exhibit H I offer a copy of a letter from the plaintiff to Solicitor Stevens, dated December the 6th, 1960, subject, Navajo Tribal Claims, and this was Plaintiff's 5-T at the pretrial.

Mr. Pittle: No objection.

The Court: It is received.

(The document was marked Plaintiff's Exhibit H for identification and was received in evidence.)

Mr. Wiener: As Plaintiff's Exhibit I, I offer a copy of a letter from Solicitor Stevens to Mr. Littell, dated January 19, 1961, which was Plaintiff's 5-Q at the pretrial.

Mr. Pittle: No objection.

The Court: It is received.

(The document was marked Plaintiff's Exhibit I for identification and was received in evidence.)

Mr. Wiener: As Plaintiff's Exhibit J, I offer a copy of a letter from Assistant Solicitor Barnes of the Interior Department to Mr. Littell, dated March 9th, 1961, which was Plaintiff's Pretrial Exhibit 5-R.

Mr. Pittle: No objection.

The Court: It is received.

(The document was marked Plaintiff's Exhibit J for identification and was received in evidence.)

Mr. Wiener: As Plaintiff's Exhibit K, I offer a rather formidable-looking document which was Plaintiff's
48 Pretrial Exhibit 5-S at pretrial, constituting some 66 pages of minutes of the Advisory Committee meeting dated September 24, 1957, which minutes were referred to in Plaintiff's Exhibit I and for the record, I call particular attention to pages 23, 24, 24-A, and 28 through 31, inclusive.

Mr. Pittle: No objection.

The Court: It is received.

(The document was marked Plaintiff's Exhibit K for identification and was received in evidence.)

Mr. Wiener: Plaintiff's Exhibit L, I offer a letter from Mr. Littell to Solicitor Barry, dated June 29, 1962, which was Plaintiff's 5-M at the pretrial, and in offering this, I would like to call Your Honor's attention to the admission in the pretrial order that Amendment 11, to which this proffered exhibit refers, was reviewed by Mr. Barry, and I will offer this.

Mr. Pittle: No objection.

The Court: It is received.

(The document was marked Plaintiff's Exhibit L for identification and was received in evidence.)

Mr. Wiener: As Plaintiff's Exhibit M, I offer a resolution of the Navajo Tribal Council CF-20-62, which was Plaintiff's 5-D at the pretrial, and I may say that this next batch of exhibits deals with Amendment 12, to round
49 out the evidence.

Mr. Pittle: No objection.

The Court: It is received.

(The document was marked Plaintiff's Exhibit M for identification and was received in evidence.)

Mr. Wiener: As Plaintiff's Exhibit N, I offer another resolution of the Navajo Tribal Council CO-49-C2, which was Plaintiff's Exhibit 5-T at the pretrial.

Mr. Pittle: No objection.

The Court: It is received.

(The document was marked Plaintiff's Exhibit N for identification and was received in evidence.)

Mr. Wiener: Plaintiff's Exhibit O, I offer Amendment 12 to the Navajo Tribal Contract, which was Plaintiff's 5-B at the pretrial, and I offer that as Plaintiff's Exhibit O.

Mr. Pittle: No objection.

The Court: It is received.

(The document was marked Plaintiff's Exhibit O for identification and was received in evidence.)

Mr. Wiener: As Plaintiff's Exhibit P, I offer the Secretary's approval of Amendment 12, dated January the 18th, 1963, and this was Plaintiff's 5-C.

Mr. Pittle: No objection.

50 The Court: It is received.

(The document was marked Plaintiff's Exhibit P for identification, and was received in evidence.)

Mr. Wiener: As Plaintiff's Exhibit Q, I offer the document evidencing the Navajo Tribal Council's approval of the legal budget in May, 1963, which was Plaintiff's 5-L at the pretrial.

Mr. Pittle: No objection.

The Court: It is received.

(The document was marked Plaintiff's Exhibit Q for identification and was received in evidence.)

Mr. Wiener: If the Court please, I now move to strike the defendant's third defense, which is the alleged failure to exhaust administrative remedies.

I have a memorandum of law here, and I will argue it briefly.

The Court: All right.

Have you had an opportunity to read this?

Mr. Pittle: No, I didn't. I suggest it is too late now, Your Honor, to file a motion to strike the defenses when an answer is filed.

The Court: Well, at least, I think we ought to withhold ruling on this or hear argument until counsel for the Government has had an opportunity to read this.

51 You can file anything you wish to in opposition to it, and we can discuss this later.

Mr. Wiener: Simultaneously, I have a motion to strike paragraph 5 of the defendant's second defense, which is clean hands, and I will defer argument on that also.

The Court: I will give the Government an opportunity to answer it.

Mr. Wiener: Certainly. And that, if the Court please, is the plaintiff's case on direct, and the only additional matter I would have as part of the plaintiff's case would be matters bearing on the scope of the relief, which I take it would be premature at this time. That is our direct case.

The Court: Very well.

Mr. Pittle: And I take it plaintiff is going to rest now and call in rebuttal testimony as we proceed with the defense on the merits?

Mr. Wiener: Well, of course, I am going to object to any defense that doesn't go to the issue of power.

I have concluded my direct case, Your Honor.

The Court: Well, let us hear what Government counsel has to say on the question of legal authority and power.

Mr. Pittle: Well, as I said in my opening statement, Your Honor, even assuming the Secretary lacks authority,
52 it doesn't follow, without more, that the plaintiff is entitled to invoke equitable relief, for the reasons set forth in the answer.

The answer was filed after the Court of Appeals decision on the appeal, the interlocutory appeal from the preliminary injunction. The only thing that the District Court had before it in determining whether or not to issue a preliminary injunction was the affidavit of the plaintiff, and a number of other affidavits, together with documents, memoranda, and so forth.

These, as I say, contain self-serving statements, which can be contradicted, and which we propose to impeach or contradict as part of our affirmative defense.

Secondly, as the Court of Appeals in its opinion recognized, it was only passing upon the question of whether the trial court abused its discretion in issuing a preliminary injunction in that unique situation.

I take it that this means among other things that the Court of Appeals was concerned with reserving the status quo, so that it would prevent irreparable injury in case the plaintiff can prove the affirmative allegations.

The Court: Now, you see, that is my difficulty. I am not quite clear on what the Court of Appeals did mean in connection with this statement, that we voice no opinion
53 on the merits. Does that mean this Court should go forward and hear the whole case, that is, the factual evidence to be introduced, and the legal question on whether or not the Secretary had the power to rescind or cancel the contract?

Mr. Pittle: Well, very frankly, we were not clear either, and that is why we filed a motion for clarification.

But I don't understand what evidence there can be on power, other than statutory authority, and that question was briefed and argued, and we think correctly, and we think incorrectly decided. But apart from the question at this time, the plaintiff has filed a complaint asking for equitable relief. He follows it up with a motion for preliminary injunction.

The basis for this equitable relief are the affirmative allegations in his complaint, which were answered by our setting up affirmative defenses and admissions and denials in our answer.

The Court: Do you have you answer before you?

Mr. Pittle: Yes, sir.

The Court: Briefly what do you allege by way of answer? What do you contend by way of answer?

If you can summarize your contentions, I would appreciate it.

Mr. Prittle: We reallege the power and authority of the Secretary to continue supervision over the affairs of Indians.

54 We say that the defendant's action in directing the letter of November the 1st, 1963, to the plaintiff informing him that his performance under the contract was suspended and telling him that he had 30 days in which to come in and show cause otherwise or the contract would be terminated was not unreasonable, arbitrary, or capricious under the circumstances.

Now, the District Court on preliminary, and the Court of Appeals on the interlocutory appeal, and again I urge the Court to consider, that they were thinking only of preserving the status quo in that situation and prohibiting a suspension or termination which could conceivably result in irreparable injury to the plaintiff until we had a full trial on the merits, which were not before the Court, either the District Court on preliminary, or the Court of Appeals on the interlocutory appeal.

This is the first time that the affirmative defenses are before the Court, and we are entitled under the ordinary rules of pleading to disprove some of the affirmative allegations in the complaint, particularly the charge that the Secretary's action was a mere subterfuge; and we are entitled to set up our affirmative defense of unclean hands, and overreaching, which disentitles one to equitable relief, for the reasons stated in the opinion of the dissenter, and the Court of Appeals case which he cited in his opinion. As I say, I believe this was hornbook law and requires no argument.

55 The Court: Well, Mr. Pittle, I am trying, No. 1, to give both parties, as you know, their day in court and grant as much latitude as I can. But if this can be disposed of on a motion for summary judgment, I think you will agree we can save a lot of time.

Mr. Pittle: I certainly agree with you, Your Honor.

The Court: Because this case may go on two weeks or more.

Mr. Pittle: But there are contested, controverted issues of material fact, which I don't see how they can be disposed of on a motion for summary judgment, apart from the issue of power. But there are several other things that remain to be decided. Even if you decide the question of power adversely, as the Court of Appeals seems to have done, we still have to determine the wording and the form of the permanent injunction that the plaintiff seeks, to enjoin the Secretary from interfering improperly with his contractual relationship.

Well, "improperly" is one of those words that means one thing to one person and another to the other. Assume the plaintiff complains about any supervision in conferences, and visits by Interior officials to the Indian agency, and consultation with Indian tribes, in matters about which the plaintiff might complain, why the plaintiff will charge this is improper interference.

56 Well, certainly, it would be interference, but you will have again the question whether it is improper.

A hearing on the facts in evidence in this case will help guide the wording of the injunction and the explanation as to what that means.

Again, with respect to the provision which the plaintiff seeks to have made permanent, enjoining the defendant from suspending or otherwise stopping the payment of vouchers on his annual retainer, this again will be a very material issue as to which the Court has heard no evidence.

We filed a motion in the District Court for clarification of that provision of the preliminary injunction, and Judge McGarraghy overruled the motion without comment, but accelerated the case for trial.

Presumably, he assumed that after a hearing, a ruling could be made on the authority of the Secretary to stop or prohibit payment of vouchers in due course.

There is a side issue to that which is very important, as to which there has been no evidence, and that is the pay roll practices of the Tribe, and the manner in which these vouchers are honored.

Again, I submit, that the plaintiff filed a complaint, and we filed an answer, and we are entitled to disprove what he charges and to assert and prove our affirmative defenses.

The Court: Let me ask you a question, Mr. Pittle:
57 Suppose that the defendant can prove what he thinks he can by way of his answer? How would that affect this litigation?

Mr. Pittle: It might be that the Secretary would continue to lack authority to terminate the contract but the plaintiff would not have his injunction and the Secretary would be free to continue to supervise unhindered the affairs of the Indians and the performance under the contract and to continue to approve and disprove vouchers when in his determination the performance had or had not been made.

Mr. Wiener: May I answer, Your Honor?

The Court: Yes, I want to get all the information I can.

Mr. Wiener: It is our view, Your Honor, that there is no power, and not only had the Court of Appeals said so, but

I can also establish independently, I am sure, just as I was able to convince the Court of Appeals, and Judge McGarraghy before them, I will be able to convince Your Honor that there was no power.

That being so, our allegation that the grounds were a subterfuge becomes immaterial. I am not going to argue that. I mean, there might be some personal relish to demonstrating it, but if he had no power, the grounds on which he proceeded, whether good, bad, or indifferent, or non-existent, makes no difference and I don't propose to go into that, and I have eliminated it on the exhibits.

58 Now, the other thing that Mr. Pittle is talking about, the scope of relief, that I admit still has to be tried, and as to the unclean hands, what he is asking Your Honor to do is to hold that the dissenting Judge was correct in saying that this has to be gone into.

On that issue, whether there is any defense of unclean hands under the allegations of the answer, that I am prepared to argue at any time Your Honor suggests, and I have filed a memorandum of law, and the allegations do not constitute unclean hands, and also to try out the issue of unclean hands would mean that the dissenting Judge laid down the law. He said: This should be looked into, and the charges should be examined before any relief is granted.

The Court: Of course, I am bound by the majority opinion.

Mr. Wiener: I think so, too.

Mr. Pittle: May I point out, Your Honor, that it is not precisely correct to say that I am telling this Court that the dissenting Judge was correct and decided the case correctly. All he said, in my understanding, is that the preliminary injunction should have been dissolved because of the charge of unclean hands and a hearing should have been had on the merits before the plaintiff got any kind of injunction, and I say that is still a correct statement of the law, but that has not decided the case. The case can be

59 decided only after you have heard the evidence on it.

And one further point, it may be legalistic, but if the plaintiff's position is correct, and if the Secretary lacks

the authority or the power to do what he did, then the case is mooted out and there is no need for any injunction because certainly the Secretary will not be violating any law.

The Court: Well, that is the thing that disturbs me. If I should decide that under the law, I don't believe he has the authority, the legal authority, and there is no statutory authority for him having done what he apparently did, would that terminate the case if the Court of Appeals agreed with this point? That is the question I have in mind.

Mr. Wiener: Yes, sir.

The Court: Without hearing any evidence?

Mr. Pittle: I think it would terminate the case, but if we prove the evidence in support of our affirmative defenses, the plaintiff would not receive an injunction.

The Court: Do you have any law on that question?

Mr. Pittle: Well, I think the law is quite clear, the decision in the dissenting Judge's opinion, which goes to that very proposition, that he who comes into equity must come in with clean hands or he cannot get equitable relief. If they want an injunction, that is equitable relief.

The Court: I will tell you what I think we ought to do in this case, before we have a long trial and listen to a
60 lot of testimony, is to give the defendant, or the plaintiff, a week or ten days to amend his complaint, and file a motion for summary judgment supported by a legal memorandum, and give you a week or ten days to reply.

If I want to hear further argument after that, after I have had an opportunity to study the memorandum, I can set it down for trial. The only harm or inconvenience which will be done or suffered is that you brought these witnesses from New Mexico; is that right?

This is one of those unfortunate things that you run across occasionally, but I think I would feel better if I listened to the arguments or considered the legal question first, frankly.

Mr. Pittle: Without trying your patience, Your Honor, may I suggest that the plaintiff has had six months in which

to file a motion for summary judgment and get that out of the way.

The Court: Yes, I do think Mr. Wiener had plenty of time to file a motion for summary judgment.

Mr. Wiener: We said in our pretrial that we thought the trial should be limited to the question of power, and it seems to me on the question of unclean hands that there is absolutely no substance to it whatever.

The Court: Well, that is a matter and a question that you can discuss in your brief, and if there are any author-
61 ities to support your position, I will consider them.

Mr. Wiener: And the only thing open, and I entirely agree with Mr. Pittle on this, is the scope of relief, and yes, there will have to be some evidence on that, and we have the evidence ready.

Mr. Pittle: Again, I have to call Your Honor's attention to the language in the Court of Appeals opinion, that we voice no opinion on the merits.

They are not talking about the merits of the law. That is what they presumably decided, and the fact that counsel notified us in his pretrial statement that they were resting on the legal contention that lack of power was dispositive, I can only point out that we disagree with that contention.

And if they wish to rest on that, even assuming they wish to rest on that contention, the Court, I believe, properly should permit us to put on our affirmative defenses at this time, and then if it chooses, after hearing argument, it may rule that the matter of law is dispositive apart from all the evidence.

Mr. Wiener: If the Court please, if Your Honor will read the petition for clarification that was denied, I think it will confirm your views that the only issue is the issue of power, and I cannot see, and after all, the unclean hands—

The Court: That is the thing that bothers me, Mr. Wiener.

Why didn't the Court finally dispose of this matter?

62 Why didn't the Court of Appeals finally say, following your argument, that there is no need for further

proceedings in this case, that we have ruled as a matter of law, regardless of what the allegations are, that the Secretary was powerless?

Mr. Wiener: There are three answers to that. In the first place, as I do not need to remind Your Honor, the issues open on an appeal from a preliminary injunction are very narrow. It was abuse of discretion. The question of power went only to the matter of abuse. The Court said very definitely there is no power.

The second reason they didn't go farther was because there was no answer filed.

The third reason that they did not go farther is because they did not consider the scope of the paragraphs to which Mr. Pittle now objects. That wasn't an issue on the appeal. In other words, the scope of the injunction as distinguished from the fact that the injunction was not litigated. That was to go back, and I think by their last sentence they had in mind what Mr. Barry had said, that when and if *Healing vs. Jones* vouchers were put in, there may have to be a set-off. That is the reason.

Now, I don't think that the mere fact that the answer makes insubstantial allegations necessarily means that there has to be a trial on it.

For instance, the answer repeats the twice rejected
63 contention that the Secretary's supervisory authority up in the clouds does service for specific statutory authority. That is repeated.

They repeated the failure to exhaust administrative remedies, which both Judge McGarraghy and the Court of Appeals rejected and then they put in the defense of unclean hands, which the majority of the Court of Appeals rejected, because if unclean hands was the bar to a temporary injunction, it was equally a bar to a permanent injunction, and all they alleged in that answer was that serious charges had been made, and I say an executive officer cannot enlarge his power by making nasty remarks about the people he is kicking around.

Mind you, there were charges, and if Your Honor will take a look at paragraph 5 of the second defense, this is really, this is guilt by association. It says: The information received and the facts which led defendant to initiate the proceeding mentioned in paragraph 4 above that is determination; to call it a proceeding I think is an exaggeration—it involved charges of a serious nature as to the activities of the plaintiff in his relations with the Navajo Tribe and are of such a nature, that is, the charges that the defendant on information and belief asserts the plaintiff is not entitled to equitable relief.

Well, no wonder the Court of Appeals didn't follow that because the law is otherwise.

64 Mr. Pittle: If the Court please, that issue of unclean hands was not before the Court of Appeals.

Mr. Wiener: Of course it was. They had a dissent.

The Court: All right.

Mr. Pittle: And the dissenter himself said, that the Court of Appeals, in footnote 1 to his opinion, the dissenting Judge said, whom you cannot follow, that the Court of Appeals decided the issue on its merits. That is why it is wrong.

In addition to that, the plaintiff has been blasting the Secretary through these charges, and the defendant has not done anything but defend. He is entitled to his day in court to do so, and I submit that the trial will be completely shortened and less expensive to hear the merits and determine the scope of the relief to which the plaintiff is entitled, if any.

The Court: Mr. Pittle, I agree with you. I think I might as well hear the whole case.

Mr. Pittle: Thank you.

The Court: All right, let us proceed. I am going to have to do it some time, so let us hear it now and decide it once and for all.

Mr. Pittle: Shall I call my first witness?

The Court: Yes.

65 Mr. Pittle: Shall I call my first witness?

The Court: Yes.

Mr. Pittle: Mr. Raymond Nakai, please.

Thereupon

Raymond Nakai

was called as a witness by the defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Pittle:

Q. Will you state your full name and address, please, Mr. Nakai? A. Raymond Nakai, Window Rock, Arizona.

Q. What is your position? A. Navajo Tribal Chairman.

Q. How long have you occupied that position? A. Since April, 1913.

The Court: Since when?

The Witness: April 13, 1963; pardon me.

By Mr. Pittle:

Q. What did you do before becoming Chairman of the Tribal Council? A. I worked for the Department of the Army, west of Flagstaff, and I was also a radio announcer over a radio station in Flagstaff.

Q. What position did you hold in the Army? A. I
66 was a supervisor.

Q. In what capacity, of what kind of work? A. There is different types, of course. I was over general supplies at first, and then later on I was over the supply section.

Q. Will you describe very briefly the Tribal Council of the Navajo Tribe? A. They are composed of 74 Council members, elected by the communities which are lying within the States of Arizona, New Mexico and Utah.

Chapters we call them.

Q. Chapters are analogous to what? Districts or sub-

districts? A. They are, I would say, subdistricts. There are 18 districts in the reservation.

Q. Now, approximately how many members of the Navajo Tribe are there? A. I would say a little over 100,000.

Q. And how many registered voters who vote in tribal affairs? A. Based on the last election, I believe, there were around 30,000.

Q. Now, up until October of last year, the Advisory Committee consisted of 9 members selected by the Tribal Chairman, I believe.

67 Can you tell me the duties of the Advisory Committee up to that time? A. The Advisory Committee, the way it is set up, is more of an executive committee. Of course, that term was never used. In all the years, it has been referred to as the Advisory Committee.

Whenever the Council isn't in session, they usually take action on certain matters which fall within the purview or authority of the Advisory Committee, which is given to them by the Council.

Q. Now, you were elected in March of 1963, and inaugurated in April of 1963.

Will you tell us briefly some of the issues in that campaign in so far as it has to do with the plaintiff in this case?

Mr. Doyle: At this point, if Your Honor please, I object to this question on the grounds that it is completely and totally irrelevant to the issues raised in the complaint and in the pretrial.

Mr. Pittle: May I respond?

The Court: I will hear you.

Mr. Pittle: Very briefly, we are showing first, that this particular litigation is actually a political controversy between the Tribe, or members of the Tribal Government and the plaintiff.

68 It is not essentially a personal vendetta between the Secretary and the plaintiff as has been charged, and I am laying a foundation for that.

The Court: Are you finished?

Mr. Pittle: Yes, sir.

The Court: All right, I will hear you.

Mr. Doyle: On that. I would likewise object on the further ground, because that does not apply to justification for grounds of the action.

The Court: I will overrule the objection.

Mr. Doyle: May my objection, Your Honor, continue on that score?

The Court: You may have a running objection, a continuing objection to this line of testimony.

All right, let us proceed.

By Mr. Pittle:

Q. Do you recall the question, Mr. Nakai? A. Will you repeat it, please?

Mr. Pittle: Will you read the question?

(The last question was read by the reporter.)

The Witness: Yes. This was one of the items that I campaigned on when I was running for the chairmanship of the Navajo Tribe.

Quite a number of the Navajo electorate throughout the entire Navajo Reservation expressed quite, or great
69 concern, about the Tribal Attorney, and this was the reason why—

Mr. Doyle: I object to that, if Your Honor please, and move that it be stricken. It is not responsive to the question.

The Court: We are talking about the issues in the campaign?

Mr. Pittle: The campaign issues, yes.

The Court: He may state what the issues were.

By Mr. Pittle:

Q. In so far as it related to the plaintiff, the issues in the case, with respect to his activities as described by you in your campaign. A. All right.

The issue, the expression of concern by the people which had to do with the actions of the plaintiff.

Q. And how was this brought up?

Mr. Doyle: I object to that and move it be stricken.

The Court: It seems to me, the expression of concern by the people which had to do with the plaintiff amounts to at least a conclusion. Let us have some clarification.

This may involve a lot of hearsay, what somebody allegedly said, or things like that.

Mr. Pittle: I will try to reframe the question.

The Court: He can testify if there were any specific issues and what they were.

70 By Mr. Pittle:

Q. What were the campaign issues in so far as the plaintiff's activities are concerned?

What did you advocate in your campaign? A. That there would be less interference in tribal affairs by the Legal Department of the Navajo Tribe.

The Court: Now, just a minute. Less interference in tribal affairs by the Legal Department of the Navajo Tribe.

The Witness: That is right, sir.

By Mr. Pittle:

Q. And the plaintiff was head of the Legal Department of the Navajo Tribe? A. That's right.

Q. Now, will you give us some of the details of the interference that you mentioned, Mr. Nakai? A. There were certain resolutions which I had no knowledge of, which the plaintiff had drafted and had given to the opposition, and were presented on the Council floor.

Q. These resolutions had to do with that? A. It had to do with Century Royalty coal lease and it had to do with the reorganization of the Advisory Committee which increased its number from 9 to 18, and there are other resolutions which I don't recall at the moment.

Q. Did you consider that these were matters within the scope of the General Counsel's duties as General

71 Counsel for the Tribe? A. I feel they are, but since the contract specifically sets forth that he and his associates work at my direction, I felt that this was a circumvention on his part.

Q. That these resolutions, if I understand you correctly, were put in without your knowledge, and you felt that the General Counsel under his contract worked at your direction? A. That is right.

Q. Did you call the General Counsel's attention to the fact that you believed he should work under your direction at any time? A. I do not recall ever bringing that matter to his attention.

Q. What did you do about the matter? A. I talked with the plaintiff, when, immediately after the inauguration.

Q. What did you tell him? Go ahead. A. He called me and invited me to a dinner in Shalimar.

Q. Who else was present? A. Mr. Leo Denetsone.

Q. Who is he? A. He is my Administrative Assistant.

Q. All right, continue.

The Court: How do you spell that name?

Mr. Pittle: D-e-n-e-t-s-o-n-e.

72 The Court: All right.

The Witness: I mentioned then that he should not involve himself in the internal affairs or the political affairs of the Navajo Tribe.

By Mr. Pittle:

Q. What did he say to you if anything? A. I don't recall what he said at the time, but I learned a few days afterwards through a report that was given to me, that he had met with the opposition in Gallup, and he came into my office a couple of days after this particular meeting and reference, and I mentioned to him that previous to that time I had pointed out that he should not involve himself in the political affairs of the Tribe.

I told him that I received a report that he had met with the opposition in Shalimar, and he said, Yes, I did, and these people requested me, requested of me, rather, certain legal opinions and I felt that it was my duty to give that opinion was the answer he gave me.

Q. All right, now do you know who were the members of the opposition, as you have described it? Were they Council members? A. This particular individual that reported, I cannot recall his name but he was a Council member that came into my office and gave me that report.

Q. Did the plaintiff tell you that a committee of
73 opposition was formed at the suggestion of the Secretary of the Interior at any time? A. The only place where that was mentioned was in the telegram the plaintiff sent to me.

The Court: Excuse me, Mr. Pittle. I was going to recess at 25 minutes after 12.

I think we will recess now until 1:45.

(There upon, at 12:25 o'clock p.m. a recess was taken until 1:45 o'clock p.m.)

74

AFTER RECESS

(The trial was resumed at 1:45 o'clock p.m. pursuant to the recess.)

Thereupon,

Raymond Nakai

resumed the witness stand pursuant to the recess and testified further as follows:

Direct Examination (resumed)

By Mr. Pittle:

Q. Mr. Nakai, just before we recessed, you mentioned a telegram that Mr. Littell had sent to you. Was that telegram in October of 1963, do you recall? A. I don't remember the date of the particular telegram that mentioned

in part where the Secretary had set up the opposition committee. I don't remember the date of the telegram.

Q. All right, sir. Before we get to that—will you mark for identification Defendant's Exhibit No. 1, purporting to be a copy of the resolution of June 25th, 1963, by the Navajo Advisory Committee?

(The document was marked
Defendant's Exhibit No. 1
for identification.)

By Mr. Pittle:

Q. I show you Defendant's Exhibit 1 for identification, Mr. Nakai, being the resolution of June 25th, 1963,
75 and ask you if you will look at it, identify it, and tell us what it is, if you know anything about it? A. This is an Advisory Committee resolution which was adopted by the Advisory Committee or the Executive Committee of the Tribal Council requesting the Secretary of the Interior to investigate and terminate the attorney contract.

Q. Will you explain briefly the circumstances under which that resolution was adopted by the Advisory Committee? A. Throughout the campaign, I promised the people that I would do something about the attorney contract, and even to the extent of terminating the attorney contract.

This promise I made to the Navajo people, and since my election to office, the Navajo people throughout the entire reservation kept repeating the promise that I made, and—

Mr. Doyle: I object to that statement and move it be stricken. That is pure hearsay.

The Court: I will grant your motion.

By Mr. Pittle:

Q. Was that resolution submitted to the Secretary, Mr. Nakai? A. That is right.

Q. Do you know if any action was taken by the Department of Interior after you sent the resolution to the Secretary? A. No action was taken for some time.

76 Q. Will you mark for identification, please, Defendant's Exhibit No. 2, being a letter of August 22d, 1963, to the Secretary of the Interior from Raymond Nakai, Chairman of the Tribal Council.

(The document was marked Defendant's Exhibit No. 2 for identification.)

Mr. Doyle: May I see that letter, please?

Mr. Pittle: Surely.

By Mr. Pittle:

Q. Mr. Nakai, I show you Defendant's Exhibit No. 2 for identification, being a letter of August 22d, 1963, to the Secretary of the Interior, this is a copy, the original of which was supposedly signed by you.

Will you look at that and tell us if you sent such a letter to the Secretary about that time? A. That is right. This was the letter that was sent to the Secretary on June 25th, or August 22d.

Q. Now, before the resolution of June 25th, 1963, was adopted by the Advisory Committee, and before you sent the letter of August 22d, 1963, to the Secretary, did you take any action or make any investigation with respect to Plaintiff's activities as General Counsel and Claims Attorney? A. I directed my Administrative Assistant to check thoroughly into the attorney contract.

77 Q. Under your direction, did you say? A. That is right, sir.

Q. And what happened after he checked thoroughly into the contract? A. Apparent discrepancies were revealed in the contract.

Q. Can you describe these briefly? A. The Navajo-Hopi boundary dispute was listed under claims.

There are other phases.

Q. In Amendment No. 11? A. In Amendment No. 11, yes, sir.

Q. All right, go ahead. A. There were certain deletions of certain words made in the contract form, the words, if I remember correctly were, at his own expense, and substituted with the words, and other attorneys.

Q. In connection with what provision of the contract generally, if you can describe it? A. I do not remember now this, where this is, but this apparent discrepancy had come out after an investigation.

Q. All right. Anything else? A. There are some others which I cannot at this time bring forth because I don't remember.

Q. Did you determine or did you ascertain whether or not disclosure had been made to the Navajo Council on these matters? A. The minutes of the Council was thoroughly checked—

Mr. Doyle: If it is by this witness, of course, I
78 won't have any objection.

The Court: Whatever he knows of his own personal knowledge.

Did you check them yourself?

Mr. Pittle: If the Court please, I understand it was done under his direction, and I will offer to connect it up with the witnesses who did actually do it.

The Court: Well, if you offer to connect it up at the proper time.

Mr. Pittle: I will offer to do that.

The Court: Otherwise it is subject to a motion to strike.

Mr. Pittle: I realize that.

By Mr. Pittle:

Q. All right, sir, did there come a time when you came to Washington for a conference with the Secretary of the Interior about the tribal attorney contract? A. I requested the Secretary, that since the Navajo people wanted something done—

Mr. Doyle: Again, I object to that as hearsay once more and move to strike it.

The Court: Well, I think it is not responsive to the question.

The question is whether he came to Washington, to confer with the Secretary.

79 That is your question?

By Mr. Pittle:

Q. That is the question, did you come to Washington?

A. I wrote the Secretary, yes, on this question.

Q. Did you have a meeting with him in Washington?

A. A very short meeting.

Q. About when? A. I don't remember the date.

Q. Do you remember whether it was before or after your inauguration? A. After the inauguration.

Q. Who accompanied you if anybody? Who came to Washington with you, if you remember? A. My Administrative Assistant, Mr. Denetson, was one of the persons that accompanied me on that trip.

Q. All right, and you met with the Secretary? Did you meet with the Secretary? A. Yes, we called on the Secretary.

Q. Do you remember who else was present at the meeting, if anybody? A. I believe Mr. Frank Luther.

Q. Who is he, do you know? A. He is a Council member; was also at that meeting.

Q. And what was the purpose of the meeting? A.
80 We called on the Secretary, It was actually a courtesy call, but the conversation somehow or other was later on focused upon the attorney contract.

Q. And what matters were discussed regarding the attorney contract? A. That since we did not have anyone that we had confidence in in looking into the contract, the provisions there for I had requested that the Secretary, since he had access to legal advisers, should look into the contract.

Q. All right, sir. May I have Plaintiff's Exhibit No. A, please?

Mr. Nakai, I show you Plaintiff's Exhibit A, page 321, which purports to be a telegram dated October 25th, 1963, addressed to you by Norman Littell.

Will you look at that and tell us if you received that telegram from Mr. Littell? A. That is right.

Q. Now, I direct your attention to Plaintiff's Exhibit A, beginning on page 324, where there is a copy of a night letter, dated October 28, 1963, addressed to Mr. Littell by you.

Will you look at that and tell us if you sent that letter to Mr. Littell? A. That is right.

Q. Will you tell us the circumstances surrounding the transmission of that letter to Mr. Littell, your night letter, and his telegram to you? A. After talking with Mr. Littell, and mentioning—

Q. What did you tell him and what did he tell you, and when was this conversation? A. This was, as I mentioned before, at Shalimar, immediately after the inauguration, when he invited me to a dinner, and I in turn called him and told him that I would have Mr. Denetsone with me.

And later when I got a report by one of the Council men, as I mentioned just a little before noon, Mr. Littell was meeting with the opposition in Shalimar, and when he came to my office a couple of days later, and I pointed this out to him, this action continued, and that is how come the telegram was sent to Mr. Littell.

Mr. Pittle: If the Court please, the documents speak for themselves, and I don't know Your Honor's custom with respect to such exhibits.

I don't suppose you want them read into the record?

The Court: I wouldn't bother reading them, no.

Mr. Pittle: All right, Your Honor.

By Mr. Pittle:

Q. Now, if you will refer to, I believe, page 267 of Plaintiff's Exhibit A—will you check it, please?

There is a letter of October 22d, beginning on page 256,

82 a letter of October 22d, 1963, to the Secretary of the Interior by Mr. Littell, and I am directing your attention to a statement that refers to secret meetings which were held at Window Rock attended by you and Mr. DeRose and others.

Q. Do you recall whether you ever attended any secret meetings? A. May I read this?

Q. Yes, you may read it. A. That Barry DeRose appeared at the secret meeting in the Pilots' Room at the Airport at Window Rock on October 3d—no; definitely no.

Mr. Pittle: At this time, I offer in evidence Defendant's Exhibits 1 and 2 for identification,

Mr. Wiener: No objection.

The Court: They will be received.

(The documents previously marked for identification as Defendant's Exhibits 1 and 2 were received in evidence.)

Mr. Pittle: I have no further questions of this witness, Your Honor.

Mr. Doyle: If it please Your Honor, for the record, at this time, I renew my objection by way of a motion to strike all of the testimony of this witness, on the grounds previously stated, and on the additional grounds that it is cumulative of matters already in evidence in Plaintiff's Exhibit A.

The Court: I will deny the motion.

83 You may proceed.

Cross Examination

By Mr. Doyle:

Q. Mr. Nakai, when was the election at which you were elected Chairman? A. In March, 1963.

Q. And that was what date in March? A. March 4th.

Q. March 4th is the election day? That is right.

Q. And inauguration was April 13th? A. April 13, 1963.

Q. And one of the issues of your campaign was to explore or to terminate the attorney contract? Did you have an issue that you were going to terminate the contract? A. That is right.

Q. How long did the campaign last? A. Oh, it lasted quite some time.

Q. What would you say, two or three months? A. It is longer than that.

Q. Six months? A. I would say about a year.

Q. About a year? A. Yes.

Q. During that time, what was your employment?
S4 Where were you working? A. I was working at, like I mentioned this morning, west of Flagstaff, working for the Department of the Army.

Q. Did you have a job in a radio station at that time? A. That is right.

Q. So you had the two jobs A. That is right.

Q. One for the Army and the other one for a private radio station? A. That is right.

Q. Did you have a program of your own? A. Yes.

Q. And what was your program? A. It is a Navajo program which I had on that station; all the Navajo language.

Q. News? A. Well, news, commercial announcements, and so forth.

Q. Did you use that time at all for the purpose of your campaign? A. Not that I recall.

Q. Now, during the time of your campaign, did you discuss the problems respecting the attorney's relationship to the Tribe, which you made an issue in the campaign, with a Mr. Barry DeRose? A. During that time? No.

Q. That is during the campaign and before the
85 election? A. No.

Q. With Mr. Larry Davis? A. No.

Q. Did you discuss this issue about the attorney contract and Mr. Littell, the one that you had raised in the campaign, with any attorney? A. This is during the campaign?

Q. During the campaign and before election? A. I have talked to many people about the attorney contract during the campaign and prior to the election, yes.

Q. With any attorney? A. Well, not that I recall.

Q. Not that you recall? A. No.

Q. Now, after your election on March 4th and before your inauguration on April 13th, did you discuss any aspect of the general counselship of the Tribe, the attorney contract, or Mr. Littell, with either Mr. DeRose, or a Mr. Schifter, or Mr. Larry Davis? A. That is after the election?

Q. After the election and before your inauguration? A. I don't recall talking to Mr. Davis or Mr. DeRose. Did you say Schifter?

Q. Or Mr. Schifter? A. Or a Mr. Schifter about the
86 attorney contract, no.

Q. Or about Mr. Littell? A. I didn't know those people.

Q. Now, when did you first know Mr. Barry DeRose? A. That was after the inauguration. I don't remember the date. I don't remember the exact date.

Q. There is no question in your mind that you didn't meet Mr. Barry DeRose until after inauguration? A. That is right.

Q. All right, can you say the same thing for Mr. Richard Schifter? A. The same thing for Mr. Schifter, that is right.

Q. And Mr. Allen Wurtzel? A. That is right.

Q. Mr. Larry Davis? A. Mr. Larry Davis, yes.

Q. You had known him before? A. Well I have heard of him. I understood he worked for the Navajo Tribe, that is about the extent that I knew Mr. Davis.

Q. But during this period you didn't meet him, that is, before your inauguration? A. Not that I recall.

Q. Now, did there come a time when Mr. Schifter and Mr. DeRose were retained in any capacity by the Navajo

Tribe or by any agency of the Navajo Tribe?

87 A. Not that I recall, but I do know Mr. Schifter was retained by the Housing Authority, the Navajo Housing Authority, the Navajo Housing Authority, after the Housing Authority was established.

Q. Now, after your inauguration, did you start meetings of your Advisory Committee, holding meetings of your Advisory Committee, either formally or informally? A. The Tribal Council went into session after the inauguration; in fact, the following Monday, I believe it was.

Q. How about your Advisory Committee? A. The Advisory Committee had to be selected by the Council, or selected by the Chairman, according to the Tribal Code, and confirmed by the Council.

This happened later on.

Q. How much later on? A. I don't remember the period, the length of period it took, that it took to set up the Advisory.

Q. One week, two weeks after your inauguration? A. It might have been a week, yes.

Q. All right, now, after you had set them up, did you hold meetings with your Advisory Committee either formally or informally? A. Yes.

Q. Now, at those meeting held with the Advisory Committee, and before May 31st, was Mr. DeRose or Mr.
88 Schifter or Mr. Wurtzel present at any of those meetings? A. Before what date?

Q. Before May 31st, and after your inauguration, at any meetings of your Advisory Committee, you and your Committee, formally or informally, were either of those three gentlemen present? A. I do not remember, but after the Housing Authority was established, or immediately before it was established, I believe Mr. Schifter did come out and Mr. Wurtzel, and they were out there to explain to the Advisory, and also the Council, the low-rent housing which the Tribe was anxious to get into.

Q. Was that the first time you met either of those two gentlemen? A. Just prior to that time, there was a Mr. Buggee, that sits in here.

Mr. Buggee was hired as an Administrative Analyst.

Q. Hired by whom? A. By myself, by the Chairman, and I don't remember now what date it was when we made a trip into Washington.

This gentlemen was the one that introduced Mr. Denetsone and myself to Mr. Schifter, but what date it was, I don't know.

Q. It was after your inauguration? A. Yes, it was after the inauguration, yes.

89 Q. And before May 31st; is that correct? A. I believe it was, yes.

Q. So it would be some time in the month of April, to the best of your recollection? A. Some time in April, yes.

Q. Now, who recommended Mr. Buggee to you? A. Mr. Buggee, I don't know how he was recommended.

Mr. Denetsone, I believe Mr. Denetsone was the one that told me about Mr. Buggee.

Q. Well, as I get the appearance of Mr. Schifter on the scene, Mr. Denetsone recommended Mr. Buggee to you, and you had not known him before? A. I didn't know him before.

Q. And you made a trip to Washington, and Mr. Buggee introduced you to Mr. Schifter and Mr. Wurtzel; is that correct? A. Just Mr. Schifter.

Q. Just Mr. Schifter? A. Yes.

Q. Now, how about Mr. DeRose? When did he first come on the scene? A. I don't remember when it was that he—that I saw him in Window Rock.

Q. Was that between your inauguration and May 31st? A. That was after the inauguration, but what date, I don't remember, and I can't recall.

90 Q. Had you know Mr. DeRose before?

Mr. Doyle: will you mark this Plaintiff's Exhibit R for identification?

(The document was marked

Plaintiff's Exhibit R
for identification.)

By Mr. Doyle:

Q. Mr. Nakai, I show you Plaintiff's Exhibit R for identification, purporting to be the resolution of the Advisory Committee of the Navajo Tribal Council, to retain consultants for the new officers of the Navajo Tribe on a temporary basis, bearing the signature of Nelson Damon, Vice Chairman, dated the 31st day of May, 1963.

I would like you to look at that and tell me whether or not your memory is refreshed concerning the employment of Mr. Barry DeRose?

Have you finished it or would you care to read it further? A. Yes.

Q. After reading Plaintiff's Exhibit R for identification is your memory refreshed concerning the employment of Mr. Barry DeRose? A. This is on May 31st. I believe right along about that time we needed some advisers on resources, and bringing in of industries to create greater job opportunities, and I believe this was what I was told the Advisory had in mind, and that was the reason why the two gentlemen were brought in.

91 Q. Well, the resolution provided for the employment of Mr. Stasser and Mr. Barry DeRose on May 31st, 1963, did it not? A. Yes. that is what it says, yes.

Q. Now, had you talked to Mr. Barry DeRose prior to that time? A. I hadn't talked to him until, I believe, after this resolution was adopted.

Q. After the resolution to approve the contract with him, and with the firm of Strasser, Spiegelburg, Fried, Frank & Kampelman was adopted? A. That is right, but I don't believe the contract was ever approved.

Q. You, however, and I show you pages 2 and 3 of this exhibit for identification, the same purporting to be a copy of a contract between the Navajo Tribe of Indians and Strasser, Spiegelburg, Fried, Frank & Kampelman of Washington, D. C., and Barry DeRose of Globe, Arizona, jointly referred to as the consultants and I ask you whether or not your signature does not appear on that contract as Chairman of the Navajo Tribal Council? A. Yes, that is my signature.

Q. And the signature likewise of Mr. Barry DeRose and Mr. Allen Wurtzel appear thereon, do they not? A.
92 That is right.

The Court: May I see that memorandum?

Mr. Doyle: Yes, Your Honor.

The Court: All right, you may go ahead.

By Mr. Doyle:

Q. Now, with you memory refreshed, would you tell us when Mr. Barry DeRose first appeared on the scene at Window Rock, Arizona? A. I don't remember. The Vice Chairman signed the resolution.

Q. All right, then we will take between the date of May 31st and the date of June 14th, at any time during that period did you meet with Mr. DeRose or Mr. Wurtzel or Mr. Schifter? A. Mr. Schifter was out, yes, but I don't remember—you said May 31st and June what?

Q. I said May 31st to June 14th. A. May 31st and June 14th?

Q. I will ask—well, go ahead. A. I don't remember the date. I can't that it was between May 31st and June that Mr. DeRose was out at Window Rock. He was out there but I don't remember just when it was.

When the Council was discussing the Housing Authority, he, Mr. DeRose, and Mrs. Wauneka, and Mr. Howard Gorman, the three of them were in my office, and I don't remember now what the conservation was all about,
93 but I was called out, to get to the Council chamber, which I did, and I have learned that the housing, the

Navajo housing was being discussed, and I took over as Presiding Officer, and we got that particular resolution on the housing through, approved by the Council, but I don't remember what date it was.

Q. All right. Tell us a little bit about that housing resolution, would you? What was the issue on the housing resolution? A. The housing was to request low-rent housing for the Navajo people. I believe the total number that was requested was 2,000 low-rent housing, which the mon-
eys will be made available from the Federal Government, and so forth.

Q. And you were going to—was there a question coming up about a contract to be made with an organization known as the Navajo Development Corporation? A. I don't remember what date that came up, but that Navajo Development Corporation was something else.

It was a proposal that we submitted by a gentleman by the name of Jack Rollins, and this proposal was submitted to the over-all Economic Development Committee.

They reviewed it for some time, and later it was presented to the Advisory, and the Advisory then passed it on to the Council, and the Council, of course, approved it.

And later on, the following week, Mr. Allen Yosey made a motion to recall that particular resolution.

94 So the resolution which the Council had adopted a few days prior to that time was recalled, and that was the end of it.

Q. Now, during all this period, did you receive any advice whatsoever concerning the attorney contract or Mr. Littell from either Mr. DeRose or Mr. Schifter or Mr. Wurtzel? A. I don't remember.

Q. You would remember if you had, wouldn't you? A. If I had, I would have remembered, yes.

Q. So your answer is they gave you no advice on the attorney contract or Mr. Littell, or your relations with Mr. Littell? A. Well, I can't recall whether they did or not.

Q. Now, what were you paying Mr. Schifter or Mr. DeRose?

Mr. Pittle: Just a minute. I object to the form of the question, Your Honor.

Will you identify who was paying those two people?

By Mr. Doyle:

Q. The Navajo Housing Authority or anyone else in the Navajo Tribe, to your knowledge? A. When the resolution was, which the Council approved in setting up the Housing Authority, the Housing Authority, the Housing Authority went ahead and signed a contract, or drafted a contract, which the Chairman is also the Chairman of the Navajo Housing Authority, and I remember signing that.

95 Mr. Schifter was designated to be the Navajo Housing attorney. He is to be paid out of the money that the Federal Government will make available for the housing project.

Q. How much? A. I don't remember what it was. It was a percentage of whatever the Federal Government allocated for that particular project.

Q. And Mr. DeRose on the same basis? A. I don't think Mr. DeRose is on that Housing Authority.

Q. Mr. Wurtzel? A. Wurtzel, of course, is working in the same firm with Mr. Schifter, and when Mr. Schifter is not available, why, Mr. Allen Wurtzel is sent out there.

In fact, he came into to see me, I believe, it was not too long ago, but on the housing.

Q. You have identified here Defendant's Exhibit No. 1, which has been admitted into evidence, which is a resolution of the Advisory Committee requesting the Secretary of the Interior to investigate, adult, and terminate Norman L. Littell's General Counsel and Claims Attorney contract with the Navajo Indian Tribe. It bears the date of the 25th of June, 1963.

I ask you who prepared that resolution? Did you prepare it? A. This resolution was drafted, I believe, by Mr. Denestone.

96 Q. By anyone else, with the assistance of anyone else? A. Not that I know of.

Q. Did you confer concernig this resolution or its preparation in any particulars with Mr. Schifter or Mr. Wurtzel? A. No, I don't think I didn't talk to Mr. Schifter or Mr. DeRose.

Mr. Pittle: I want to object to this line of testimony, Your Honor, because it is completely irrelevant and immaterial to this case, whether Mr. Nakai conferred with anybody about this matter, other parties, third parties.

The Court: I will overrule the objection.

All right, proceed.

By Mr. Doyle:

Q. Did Mr. Schifter and Mr. Wurtzel give you any advice or direction on that resolution? A. Not that I recall.

Q. Mr. DeRose? A. Not that I recall.

Q. Did you talk the matter of the resolution over with any of these three gentlemen? A. Not that I know of.

Q. Now, on the particulars that are recited in here, the resolution is three or four pages, were you present at the Advisory Committee when the resolution was being
97 discussed? The resolution that started all this business? A. There is your Presiding Chairman, Nelson Damon.

Q. Were you present at any time when this was discussed? Is your answer no? A. We had discussed different phases of the attorney contract.

The Court: Just a minute. I think the question was: Were you present at any time when that resolution was discussed? Is that your question?

Mr. Doyle: Yes, sir.

The Witness: Like I said this morning, I directed my Administrative Assistant to get on this attorney contract, and in fact, even to the extent of preparing a resolution.

By Mr. Doyle:

Q. You directed Denetsone then — A. That is right.

Q. To do the investigating, prepare the resolution? A. That is right.

Q. You didn't investigate yourself? A. Well, how can I investigate this thing? I have so many things to do.

Q. Your answer is you didn't investigate it? A. I looked at the attorney contract, yes.

Q. All right, and did you do anything else, other
98 than look at the attorney contract? A. Well, I said this morning also, that I talked to the Secretary that he should —

Q. I am talking about before June 25th. Did you talk to the Secretary before June 25th? A. On the attorney contract?

Q. Yes. A. Yes.

Q. All right, so your investigation consisted, your personal investigation consisted of looking at the contract, and then talking with the Secretary?

Mr. Pittle: I object, the witness has answered the question, and I object to the summation and characterization.

The Court: Well, this is in the form of leading questions on cross examination.

The Witness: Repeat that, please?

By Mr. Doyle:

Q. What I want to find out is what your investigation of the matter amounted to, your personal investigation?

We know that you had told Mr. Denetsone to investigate and write a resolution. What was your part in the investigation? What did you do? A. He reported his findings, the apparent discrepancies, and so forth, and based on that, I directed him to do everything he possibly could to get a resolution drafted, based on his findings and so forth.

99 Of course, I talked to the Secretary about this.

Like I mentioned, based on the desires of the

Navajo people, I had to talk to him about that, and he, of course, worked on it and got the thing drafted.

Q. You mean, Denetsone worked on it and got it drafted?

A. That is right.

Q. What materials did he give you or show you before the drafting of this resolution, other than the contract? Anything else, other than the contract itself? A. Well, he showed me some papers.

Q. What were the papers? A. I can't recall just what it was. It had something to do with Amendment No. 11.

Q. It had something to do with Amendment No. 11? A. Also the Healing vs. Jones, the Utah Navajo Tribe, and the Utah Kais, and also deletions of certain words from the contract.

Q. Was this from the contract itself or were there other papers concerning this? A. There were other papers, I believe.

Q. All right, and now describe to the Judge what the other papers were? A. It was Council minutes, trying to determine where Healing vs. Jones was discussed before the Council.

This particular item didn't appear as being discussed before the Council.

The only items that were brought out had to do with increases in salaries of two attorneys, Leland O. Graham, and Mr. Walton.

But we could not find where Healing vs. Jones was discussed or was reported to the Council that it would be placed in the contract as a claims case.

Likewise, was the Navajo Tribe vs. the State of Utah, and also the deletions of the phrase, which I mentioned this morning, at his own expense, and also the substitution of the words, and other attorneys working on claims.

Q. All right, what else did your investigation consist of prior to this June 25th resolution? A. Most of the other work was done by, like I said before, Mr. Denetsone, and I directed him to look into this thing.

Q. But you reviewed Mr. Denetsone's work before such a powerful resolution was passed, did you not? A. Yes, I reviewed it.

Q. And did it consist of anything other than what you have told us here? A. Well, I don't recall at the moment.

Q. Now, you went to Washington on or about, or you were in Washington on or about June 21st of that year, 101 were you not, '63? A. I was in Washington, yes.

Q. I call your attention to Plaintiff's Exhibit A, to page 206 thereof, and an article appearing in the Arizona Republic, dated Saturday, June 22d, 1963, which recites that Tribal Chairman Raymond Nakai declared here yesterday he will dispense with the services of Norman Littell, the Navajos' General Counsel since 1947.

I ask you if that refreshes your recollection as to the date you were in Washington? A. That is June 22d, but we didn't come up here to discuss the attorney contract at the time.

What happened —

Q. Yes, tell us what happened. A. When we were here in Washington, we found a telegram waiting for us.

We paid the Commissioner, I believe, it was, a call, and here was a telegram, which had the names of Mrs. Wauneka, Pete Riggs, and I don't remember who the others were, about four names on that particular telegram, and it said that the Chairman and the other people that were here were not authorized by the Council to be here in Washington.

I don't remember the full contents of the telegram. I believe they also mentioned in that particular telegram that we were up here on the attorney question.

Q. By "we," who do you mean? Who was "we"? 102 Who was with you? A. I believe it was Mr. Denetsone and Mr. Luther.

Q. Anybody else? A. I think that is when we had also Mr. DeRose.

Q. Mr. Barry DeRose? A. That is right.

Q. He was here with you? Was he in the meeting with the Secretary, or meeting with anybody at the Department

of Interior at that time? A. I don't remember whether he was in the Secretary's office or not.

Q. Did he go over to the Department of Interior with you? A. Yes, he went over.

Q. And when you went over to the Department of Interior, who did you see? A. I believe that was the time we went and talked to Mr. Fry.

Q. Mr. Who, sir? A. Mr. Fry. And also the Commissioner, and we decided then to pay the Secretary a courtesy call.

Q. Now, before you went in to see the Secretary, you mentioned two other gentlemen, Mr. Fry? A. Mr. Fry.

Q. And what is his position or was his position at 103 that time? A. We talked to him, if I recall correctly, we talked to him about the — I think there was some representative of a manufacturing firm, and this firm, or the representative represented Emily Hose, I believe.

Q. Was there any conversation with that gentleman about the attorney contract? A. No.

Q. Who next did you see? A. The Commissioner.

Q. What was his name? What is his name? A. Fileo Nash.

Q. All right, now, was Mr. Barry DeRose in the conference with you and Mr. Fileo Nash? A. I don't remember whether Mr. DeRose was there in that office or not.

Q. Did you mention anything whatsoever concerning Mr. Norman Littell to Mr. Fileo Nash? A. Not that I recall.

The Court: Excuse me a minute, counsel. I think we will take our afternoon recess.

Now, let me suggest this — Mr. Nakai, is it?

The Witness: Mr. Nakai.

The Court: Unless I tell you this, you probably wouldn't know it, and there is no implication in what I am 104 saying.

But while we are having this brief recess, please don't discuss your testimony with anybody, and this goes for the other witnesses.

Mr. Pittle: We understand, Your Honor.

The Court: We have a rule here that when a witness is testifying, or when he is temporarily excused, or over night, that he should not discuss his testimony and what he said with anybody else.

Mr. Pittle: He has been cautioned on this, Your Honor.

The Court: All right, we will take a 15-minute recess.

(Thereupon, a short recess was had.)

Mr. Doyle: Mr. Reporter, to refresh my mind, and the Court's and opposing counsel, would you read the last question and the last answer?

(The last question and answer was read by the reporter.)

By Mr. Doyle:

Q. Did Mr. Barry DeRose or Mr. Frank Luther mention anything to Mr. Fileo Nash in your presence about Mr. Norman Littell or the attorney contract? A. Not that I know of.

Q. Now, after your meeting with Mr. Fileo Nash,
105 did you see anybody else in the Department of Interior? A. We saw Secretary Udall after that.

Q. Now, did you say anything to Secretary Udall about Mr. Littell or the attorney contract? A. This was what date?

Q. You said you were in Washington on the 21st and 22d, and I gathered your meeting, from your previous statement, your meeting over at Interior, was approximately the 21st of June, 1963, on or about that time. A. I believe we did, or I did mention something to the Secretary about the contract.

Q. All right, and what did you say to him and what did he say to you if anything? A. I requested the Secretary that since I felt that he had the authority, since the Council was established or set up according to his rules and regulations, that I felt he had the authority to do something about it and that something should be done.

Q. Now, before that you doubtless told him what there was that you thought ought to be done. Will you describe your conversation a little more fully?

What did you tell him that you thought was wrong with the contract, or wrong with the conduct of Mr. Littell?

A. I don't remember whether we covered that phase or not but the mention was made on the attorney contract.

106 Q. Did you complain about Mr. Littell? A. To the extent that the — that that was one of the issues in the campaign.

Q. But did you mention to him any of this material that a few days later became a tribal resolution or Advisory Committee resolution, rather? A. If I remember correctly, I think I believe we did cover some of those, but I can't recall exactly what it was that we covered then.

Q. By "we," do you mean yourself, Mr. Luther and Mr. DeRose? A. Mr. DeRose I don't believe was in there with us.

Q. You don't believe Mr. DeRose was there at all? A. No.

Q. All right, and what did the Secretary say? A. I can't recall what the Secretary said.

Q. What? You don't recall? A. I don't recall.

Q. All right, now, did you see Mr. Frank Barry on this occasion, the Solicitor of the Department of the Interior? A. I believe we did.

Q. All right, and who was with you when you saw Mr. Barry? Was Mr. Luther there? A. I am sure he was.

107 Q. Was Mr. DeRose there? A. Not that I recall.

Q. What did you say to Mr. Barry and what did he say to you? A. I don't remember what we talked about.

Q. Now, I refer you again to Plaintiff's Exhibit A, on pages 206 and 207 thereof, and specifically to the paragraph next to the last paragraph on page 207, in which the reporter, Mr. Ben Cole says as follows:

Nakai said that for the present he is receiving legal assistance from Barry DeRose of Globe, counsel for the White

Mountain Apaches, and from Richard Schifter of the Washington firm of Strasser, Spiegelburg, Kampelman and McLaughlin;

And I ask you whether or not there was any discussion with the Secretary or Mr. Fileo Nash or Mr. Frank Barry respecting your present legal assistance from Mr. DeRose or from Mr. Schifter? A. Let me see that again, will you, please?

Q. Surely. A. This I believe was the — that is the news article that was released evidently in the Arizona Republic.

This legal assistance has to do with what I mentioned this morning on the development of the resources, and so forth.

Q. And the legal assistance had nothing to do with
108 any other matter; is that correct? A. Not that I recall.

Q. Let me ask you this: This article by Mr. Cole dated June 22d, says that the day before, that you said in Washington that you would dispense with the services of Norman Littell, the Navajo General Counsel since 1947.

Maybe a week, maybe a month, maybe a year, said Nakai, but I will get rid of that man.

Did you say that? A. That is right, I said that.

Q. Then at the same time, did you say that you charged Littell, a one-time Washington attorney, and one-time Solicitor of the Interior Department, with interfering with tribal politics?

Did you say that to the newspaperman? A. That is right.

Q. And did you say: For legal advice, I go to my lawyer; for political advice, I go to the Navajo people?

Did you say that to him? A. That is taken out of the inaugural address.

Q. And did you also say, as recited over here on page 207, that for the present you are receiving legal assistance from Barry DeRose of Globe, and from Richard Schifter of the Washington firm?

Did you also say that? A. That had to do with the
109 assistance that we were getting from DeRose and
Schifter on resources development and economic
development.

Mr. Pittle: Mr. Doyle, since you read all the article, will
you please read the last paragraph also on 207?

Mr. Doyle: Schifter has assisted the Tribal Housing
Authority in getting a commitment for 300 low-rent homes
to be built at six communities on the reservation, four of
them in Arizona, at Window Rock, Tuba City, Chinle, and
Kayenta.

By Mr. Doyle:

Q. Did you also say that? A. That is right.

Q. Now, I suggest to you that on April 15th, right after
your inauguration, that you met at the office of Mr. Buggee
with Mr. Schifter and with one of your auditors of the firm
of Pete, Marwick, and Mitchell?

Did you have such a meeting? A. At my office with —

Q. At Mr. Buggee's office, with Mr. Schifter and an audi-
tor of the firm of Pete, Marwick, and Mitchell, on April
15th, the day of your inauguration? A. No, Mr. Schifter
wasn't there.

Q. Very well. A. Mr. Buggee was the only one, I directed
him to check with the auditors in Albuquerque.

Q. Now, as I get the chronology, on the 21st you
110 were in Washington, the 21st of June, and then did
you return to Window Rock? A. Yes, we did.

Q. And the Advisory Committee resolution, which has
now been introduced as Plaintiff's Exhibit 1, bears date of
June 25th.

Were you home when that was passed? A. I believe I
was, yes.

Q. All right. Now, during the period after — may I have
No. 2, please?

Mr. Pittle: Surely.

Mr. Doyle: I am talking about Defendant's No. 1, De-
fendant's No. 1.

By Mr. Doyle:

Q. Now, Defendant's 1 bears date of August 22d, 1963. Between June 25th, when the resolution was passed, and August 22d, 1963, did you confer with anyone concerning the attorney contract during that summer — well, strike that.

Did you confer with Mr. Barry DeRose concerning the contract? A. Never to my knowledge.

Q. Or Mr. Littell? How about Mr. Wurtzel? A. Not that I know of.

Q. How about Mr. Schifter? A. Not that I recall.

111 Q. Did you make further investigation during that period? A. Investigation on what?

Q. Of the attorney contract or Mr. Littell? A. Well, the contract and the minutes were under scrutiny, yes.

Q. By you? A. By, sometimes by me, and then, of course, the people, the one I assigned to go ahead.

Q. Who was it that you assigned? A. Mr. Denetsone, I mentioned this morning.

Q. Did you confer with any members of the Department of Interior concerning the attorney issue during this period, June 25th to August 22d? A. June 25th, that is after the adoption of the resolution.

Q. The resolution was on June 25th, and then you sent the letter in, which I showed you as Defendant's Exhibit 2, on August 22d, and what I am trying to determine is what you did between those two dates, if anything, respecting the issue.

Specifically, did you talk to any member of the Department of the Interior concerning the issue during that period? A. I don't recall talking to anyone in the Department of the Interior between that time.

112 Q. Mr. Landbloom, perhaps? A. No.

Q. Mr. Young, perhaps? A. Not that I know of.

Q. Did you make a trip to Washington and have a conference with anybody concerning this issue during that period? A. I don't remember now. Things was happening

so fast that I may have ended up in Frisco the next couple of days, so I don't recall.

Q. All right. Then between August 22d and November 1st, what if anything did you do respecting Mr. Littell or the attorney contract issue? A. What were the dates again?

Q. August 22d is when you sent that last letter in, which is Defendant's No. 2, to the Department, and I am asking you whether or what if anything you did respecting this issue of the attorney contract or Mr. Littell from the period of August 22d to November 1st? A. I don't recall what I did within that period.

Q. Do you recall talking to or discussing the matter with anyone other than Mr. Denetsone? A. Not that I know of.

Q. Now, in November you issued what is called or what was described as a white paper around the reservation, did you not? A. Yes, I remember but I don't remember the date.

Q. If I suggested it was somewhere in the month of November, is that approximately what your recollection would be?

Mr. Pittle: I would like to have an objection to this line of testimony, Your Honor, involving events which occurred after the issuance of the law suit on November 18, 1963, I believe.

The Court: Can't you agree on the date of the white paper?

Mr. Doyle: The white paper was I think approximately, it was after — will you bear with me a moment, Your Honor — I think it was contemporaneous with or a little before or after the filing of this law suit. It might have been a little after, it might have been a little before.

Mr. Pittle: The basis for my objection, if I may be permitted to explain it, is to avoid going into the events which gave rise to the motion to cite for contempt, and certainly the investigation, I would have to concede, would be rele-

vant and pertinent in any investigation conducted up until yesterday.

The Court: All right, I will let him answer.

By Mr. Doyle:

Q. Did you issue a thing called the white paper? A. Yes.

114 Q. What was it, a kind of defense of your position?

A. Well, after the adoption of the resolution, which we covered, there was no action taken on it, as I explained this morning, so the letter followed, and we followed up with a letter to the Secretary, and after their scrutiny of the contract, and also the work that was done by Mr. Denetsone, and who he talked to I don't know, and then came a letter from the Secretary raising certain points.

When that happened, all of those were incorporated into the so-called white paper and it came out in a booklet form.

Mr. Doyle: Would you mark this Plaintiff's No. S for identification?

(The document was marked Plaintiff's Exhibit S for identification.)

By Mr. Doyle:

Q. I show you Plaintiff's Exhibit S for identification and ask you to examine it and state whether or not that is not a copy of the white paper to which you made reference? A. That is right, this is part of it.

Q. And who wrote it? A. Mr. Denetsone and Mr. Robert Young helped in the compilation of that white paper, and then, of course, I had something to do with it also.

115 Q. And who is Mr. Robert Young? A. He is the Assistant Area Director.

Q. Of the Bureau of Indian Affairs? A. That is right.

Q. Now, Mr. Nakai, I call your attention again to Plaintiff's Exhibit A and to page 46 thereof, which is paragraph numbered 12 of the attorney-client contract between the Navajo Tribe of Indians and Mr. Norman Littell, and

others, signed in October of 1957, and approved in November of 1957.

I call your attention to paragraph 12 (a) thereof, entitled Termination, and ask you whether or not you are aware of that provision of the contract? A. That is right.

Q. That contract provides for the termination of the contract for good cause shown in respect to any one or all the second parties' services as general counsel after giving 60 days' notice to any of second parties in respect to which termination is sought, the said termination to become effective upon approval of the Commissioner of Indian Affairs.

Isn't that correct, part of it? A. Yes, sir.

Q. Now, I want to call your attention to Title 2, Section 163 of the Navajo Tribal Code, entitled Agenda, and ask you if you are familiar with that article? A. That is right.

Q. According to that article 163, if not later than 116 30 days preceding a regular meeting of the Tribal Council, Councilmen desire to include items of business on the agenda of the Council meeting shall submit such items to the Chairman of the Tribal Council at Window Rock, and it provides so, does it not? A. That is right, and there is a deadline on it, of course, they have to submit it by 7:30 of the first day of the Council session.

Q. Was it a question of whether or not Mr. Littell's contract should be terminated ever placed upon the agenda — well, first, ever before the Navajo Tribal Council? A. No.

Q. Was it ever placed on the agenda by you or by anyone else? A. No.

Mr. Doyle: May this be marked Plaintiff's Exhibit T for identification?

(The document was marked Plaintiff's Exhibit T for identification.)

By Mr. Doyle:

Q. Mr. Witness, I show you at this time Plaintiff's Exhibit T for identification, the same being a copy of the resolution of the Advisory Committee of the Navajo Tribal

Council, bearing date the 15 day of November, 1963, passed
by a vote of 9 in favor, and none opposed, on that day,
117 and bearing the name Nelson Damon.

Now, I ask you to examine it and tell the Court whether or not this resolution does not provide, now, therefore, be it resolved that the Chairman is requested to place before the Navajo people a full statement of the facts concerning the performance of the attorney contract and the investigation thereof.

No. 2, the Chairman is requested to deliver this statement to the members of the Tribal Council by mailing it to them directly with a recommendation that each Council member discuss the Chairman's report with his constituents to better secure their opinions and desires.

3, the agenda for the next meeting of the Tribal Council shall include a complete discussion of the circumstances surrounding the attorney contract;

And 4, the meeting of the Tribal Council be postponed until December 9, 1963, when the members of the Tribal Council will be fully informed of the facts surrounding these events and the views of their constituents.

Now, I ask you whether or not the resolution does not so provide?

Mr. Pittle: If the Court please, we stipulated the procedure of getting things on the agenda, but I object to this line of inquiry because by the time of that resolution,
118 I understand the injunction was already out, and the Secretary and his subordinates and the people in with them were enjoined from doing anything.

The Court: Well, maybe you can tell me the probative value you think this type of evidence has.

Mr. Doyle: I think it has this value, Your Honor: First of all, the dates can be checked, but I don't believe the injunction had issued.

Had it issued?

Mr. McKevitt: No.

Mr. Doyle: I didn't think it had issued on November the 15th.

No. 2, I am extremely interested in seeing to it that it is established before Your Honor that although Paragraph 12 of the contract says that the contract may be terminated by the Council for good cause at any time, with the 60 day notice provision, and I wish also to show to Your Honor by every possible means that it has never been placed on the agenda and it has never come before the Council, in face of the resolution established on 15 November, 1963.

Mr. Pittle: We will so stipulate.

Mr. Doyle: That is the purpose of my offer.

The Court: I will let him answer.

By Mr. Doyle:

Q. The resolution provides as I read it, doesn't it?

119 A. That is right.

Q. Did you place it on the agenda as directed by the resolution? A. There was something happened. Something happened right along about that time. That was the reason this particular resolution was not placed on the agenda of the Tribal Council.

I was thinking perhaps that suit that Mr. Littell brought against the Chairman of the Tribal Council had something to do with the resolution not being placed on the agenda.

Q. Has it been placed on the agenda to this date? A. Not yet.

Mr. Doyle: That is all, Your Honor.

Mr. Pittle: I have no further questions, Your Honor.

The Court: All right, no further questions.

Now, if it is necessary to have this witness return, I think we ought to make some arrangement about that.

You are excused for the time being, Mr. Nakai, but if it is necessary for you to return, we will expect you to return.

Mr. Pittle: We will see that he remains in Washington to the conclusion of the hearing, but I wondered if your remark was directed to his presence in the courtroom.

The Court: No; do you have any objection to this witness remaining in the courtroom?

120 Mr. Doyle: I think he should remain in the courtroom. There is no objection to that.

The Court: Well, that is the usual practice, after a witness has testified, he may remain in the courtroom, except under special circumstances.

Mr. Pittle: Thank you, Your Honor.

All right, you are excused.

(The witness was excused.)

Mr. Pittle: Our next witness is Mr. Leo Denetsone, Your Honor.

The Court: Well, I was just thinking, it is ten minutes to four, and rather than break into the witness' testimony, that we better adjourn until 10 o'clock tomorrow morning and start off fresh in the morning with the witness.

Mr. Pittle: All right, Your Honor.

The Court: All right, we will adjourn now until 10 o'clock tomorrow morning.

(Thereupon, at 3:50 o'clock p.m., an adjournment was taken until 10 o'clock a.m. on Tuesday, February 2, 1965.)

* * * * *

181 February 2, 1965
Washington, D. C.

* * * * *

183 PROCEEDINGS

The Court: All right.

Mr. Doyle: Your Honor, I would like permission of the Court to recall the witness, Mr. Nakai, for a very few questions.

The Court: Is he here?

Mr. Doyle: He is here.

Whereupon

Raymond Nakai

having been recalled as a witness by the Plaintiff, having been reminded he was still under oath, took the stand, was examined and testified further as follows.

Mr. Doyle: May I have this marked as Plaintiff's U for identification?

The Court: Plaintiff's Exhibit what?

The Deputy Clerk: U, Your Honor.

Plaintiff's Exhibit U marked for identification.

(Plaintiff's Exhibit U was marked for identification—copy of the white paper issued by Mr. Nakai.)

Cross Examination

By Mr. Doyle:

Q. Mr. Nakai, I show you Plaintiff's Exhibit U for identification and ask you to examine it and tell us if that is the copy of the white paper issued by you about which you testified yesterday?

184 Mr. Pittle: May I speak with counsel a minute, Your Honor?

(At this time counsel conferred.)

The Witness: That is right.

By Mr. Doyle:

Q. Now, in response to some questions on direct examination by Mr. Pittle, it is my recollection that one of your complaints was that Mr. Littell had drafted a resolution for the opposition concerning a change in the composition of the Advisory Committee; is that correct?

No. 8 to No. 18? A. That is right.

Q. Did that resolution pass the Council? A. Yes, it was approved by the Council.

Q. So the Advisory Committee has now changed to 18 members by vote of the Council? A. That is right.

Q. When did that occur? A. Oh, I do not remember the exact date.

Q. Approximately? Last fall, wasn't it? A. Not too long ago. Not too long ago.

Q. You mean within the last two or three months? A. That is right.

Q. Now, isn't it a fact that during the first six or eight months of 1964 that you, and people acting under
 185 your direction, held up the vouchers of Mr. Littell, did not forward them to Washington? A. I directed my Administrative Assistant to carefully review the vouchers, that certain portions as purported by Mr. Littell I figured were not right, because he did not confer with me, nor did he ask me that he was coming to Gallup or to Window Rock.

This is what I meant, that he circumvented the authority of the tribe when he stated in his contract that he went in the direction there and at the request of the Chairman of the Tribal Council.

Q. How long did this investigation of the vouchers take?

Mr. Pittle: The Court please, I object to this line of inquiry. It has to do with events that occurred this past year, which have already been brought out.

The Court: Maybe you'd better come to the bench and I will hear you at the bench.

At the bench in a low monotone:

The Court: I want to follow the theory.

Mr. Wiener: Actually, Your Honor, logically this comes later in the case. It has to do with the scope of the duties, but, as a matter of convenience, since this witness is here from far away, this is the time to bring it out.

The Court: Well, what probative value do you
 186 think it will have to the issue in the case?

Mr. Wiener: It will have a distinct probative value as to the necessity of retaining the paragraph in the interlocutory injunction and in the permanent injunction.

We will show somewhat what has developed in the documents, that these vouchers were held up from six to eight months, and it was only at the jogging of the Department here that they were turned loose and therefore approved by Mr. Nakai, and the Secretary of the Interior last November, just a few months ago, sent them on.

Mr. Pittle: I will stipulate to all of that. Mr. Nakai is not a party to the action. He is the one who held them up.

The Court: It is agreed then?

Mr. Wiener: It is agreed that he held them up. Fine.

The Court: Very well.

End of bench. Open Court:

Mr. Doyle: Please mark this paper as the next exhibit number.

The Deputy Clerk: Plaintiff's Exhibit V for identification. V as in Victor.

(Plaintiffs Exhibit No. V was marked for identification.)

By Mr. Doyle:

Q. Mr. Nakai, I show you Plaintiff's Exhibit V for
187 identification, purporting to be a copy of the resolution of the Navajo Tribal Council, passed on the 10th day of July, 1963, to reorganize the office of the Treasury of the Navajo Tribe, and ask if you recognize that exhibit?
A. Yes.

Q. And this exhibit by its terms reconstitutes the Department of the Treasury as the Office of the Treasury of the Navajo Tribe and not as part of any division, providing that the Treasurer shall report directly to the Chairman, does it not? A. Yes, sir.

Q. It also provides that the Treasurer of the Navajo Tribe be appointed by the Chairman of the Navajo Council, with the advice and consent of the Tribal Council, does it not?
A. Yes, sir.

Q. It provides that the Treasurer shall be responsible for the receiving, disbursements, and the custody in accordance with all budget and other resolutions of the Navajo Tribal Council, and all funds of the Navajo Tribe which are not received, disbursed or held in custody by the Bureau of Indian Affairs; and generally performs all services related to the finances of the Navajo Tribe which may be directed to perform by resolutions of the Navajo Tribal Council or by order of the Chairman of the Navajo Tribal Council not

in conflict with such resolutions. Is that correct? A.

188 Yes.

Q. Who advised you on that resolution? Who advised you on that step to be taken?

Mr. Pittle: I object to the form of the question. I haven't heard testimony that the witness was responsible in any way for the resolution.

The Court: Well, you can rephrase the question. Did anyone advise you?

By Mr. Doyle:

Q. Did anyone advise you concerning this resolution? A. The question is rather nebulous, Your Honor.

The Court: I think you can answer it. Just a minute. The question is very simple. The question, I think, as I put it myself—did anybody advise you on that resolution? It is a resolution?

The Witness: Your Honor, the reason I say nebulous, I would say many people advised us on the resolution, but actually I believe Mr. Doyle wants me to—has in the back of his mind—

The Court: Now wait a minute. Do not try to anticipate or guess what is in Mr. Doyle's mind. I think we have enough problems in this case as it is.

Mr. Pittle: May I call your attention to the fact that Mr. Nakai did not sign this resolution. The question assumes that he had something to do with it.

189 The Court: Well, ask him if he knows about it.

By Mr. Doyle:

Q. Do you know about this resolution? A. I know about the resolution, yes.

Q. Prior to its passage, did you have anything to do with the submission of the resolution? A. I believe I talked to my Administrative Assistant, my Vice Chairman, and also the Management Methods and Procedures on this particular

resolution, or the structure and the responsibility of the Treasurer to the Administration Division.

It was passed. It was acted on by the Council, but not too long thereafter it was reestablished in the form that was set up prior to this change that was made.

Q. Did you initiate this change? Did you start this change? A. I believe Management Methods and Procedure, after their study, along with Mr. Buggee, suggested that the change should be made.

Q. You had Mr. Schifter a part of this Management Consultant and Administration, or whatever it is? A. No.

Q. Did any attorney, other members of the Navajo legal staff, speak to you concerning this resolution? Confer with you concerning this resolution? A. I don't remember
190 or not the legal staff of the tribe was approached on that particular resolution.

Q. Did you talk to Mr. Littell about it? A. No, not Mr. Littell. I might have mentioned it to Mr. Walter Wolf, Mr. Ted Carver or Mr. Johnson.

Q. Did you mention it to him? A. I might have.

Q. Is it your best recollection that you did? A. Well, not personally.

Q. Did you discuss this with any outside attorney? A. I don't recall whether—I personally can't say I did.

Q. Can you say you did not? A. That is right.

Q. Now, does this refresh your recollection as to whether or not, on April the 15th, you had a meeting in the office of Mr. Buggee with Mr. Schifter and an auditor or member of the firm of Pete, Marwick & Mitchell? A. No.

The Court: Will you pass that up, Mr. Doyle?

Mr. Doyle: Yes, Your Honor.

(Document was passed to the Court.)

By Mr. Doyle:

Q. Now, Chairman Nakai, you have been questioned, have you not, at the Navajo Tribal Council respecting the
191 receipt by you, or alleged receipt by you, on or about April the 7th, 1963, of a sum of \$5,000?

Have you not been questioned at the Navajo Tribal Council concerning that? A. That matter of \$5,000 is personal and I would rather not get into it.

The Court: Now just a minute.

Mr. Pittle: I object to this line of questioning, Your Honor. I don't understand where it is relevant or what he is trying to prove by it.

The Court: Well, suppose you approach the bench.

At the bench in a low monotone:

The Court: This relates to something that took place in April of 1963?

Mr. Doyle: Right around there or prior to his inauguration, and he has been asked, as I understand, at the Navajo Tribal Council about the receipt of a sum of \$5,000 around that particular time.

It was deposited and he has refused to make an answer concerning it. I would wish to question him about it, to examine it, and see just where and what his interest might have been, for the purpose of possibly attacking his credibility.

The Court: Will this show any light on the controversy here, to this litigation here?

192 Mr. Doyle: I think it will be pertinent.

Mr. Wiener: It will be pertinent to show that his opposition to Mr. Littell started after this alleged deposit of \$5,000. I think this is highly pertinent.

The Court: If that is your purpose—you see, Gentlemen, I am trying to give both sides a lot of latitude. This is a non-jury case—to get the entire picture of this matter. That is one reason why I had in mind that I might just as well try this case, as the Government suggested yesterday, try it on the merits and find out what it is all about.

If you can connect this up and show prejudice or bias on his part against Mr. Littell, and that he was questioned about a \$5,000 item—not what the \$5,000 related to.

Mr. Wiener: The \$5,000 he was questioned about—

The Court: By whom was he questioned?

Mr. Wiener: At the Council meeting.

Mr. Pittle: By his opposition. Your Honor, there were lots of questions.

Mr. Wiener: He was questioned concerning the alleged deposit of \$5,000 at the Council meeting. We expect to show that he refused to answer. We further expect to show that this alleged \$5,000 cash deposit just before he took office had a material affect on the lack of confidence by the
193 Chairman of the General Council.

The Court: Do you mean the 74 members of the Council?

Mr. Wiener: No, the General Council; not the Tribal Council.

Mr. Pittle: Maybe I can ask him a question.

The Court: Well, let me ask you this question. The date was April, and was this after the inauguration?

Mr. Doyle: Right before it. After the election, but before the inauguration.

The Court: All right, I will allow the question and see what the answer is.

End of bench. Open Court:

By Mr. Doyle:

Q. Were you asked about the receipt of \$5,000 on or about April the 7th by any members of the Tribal Council? A. Yes.

The Court: Will you get closer to the microphone, Mr. Nakai?

The Witness: Thank you, Your Honor.

This is a personal matter, Your Honor, and it doesn't even fit into this case.

The Court: I think at the proper time the Court will have to determine whether it is important or not, and whether it has any bearing on the issues or not. I think you
194 will have to answer the question, Mr. Nakai.

The Witness: Yes, I was questioned by the Council, and I told the Council that this was personal, that they

shouldn't meddle into my personal business about this deposit and so forth.

And how this information got out of the bank, I don't know. Do you want to know where that \$5,000 came from?

By Mr. Doyle:

Q. Yes. A. Just like I said, this is personal and I meant it.

The \$5,000 that I deposited in the bank down there came from my retirement from the United States Department of the Army.

Q. How long had you— A. Had I worked?

Q. How long had you worked there? A. Seventeen years.

Q. And what was your grade there in the Army? A. I was a supervisor. Of course, it went from 10, 3 10 and 4 and back down. It kept weaving about that.

Q. At what grades? A. Ten, three and seven and nine—right around there.

If you want to get that information, all you have to do is get a hold of the Department of the Army and they will make it available to you.

195 Mr. Pittle: Your Honor, I would like a clarification.

Is this a grade or salary the witness is answering or responding to?

The Witness: It is a grade, step, and so forth. This had nothing to do with this case.

Mr. Doyle: No further questions, Your Honor.

The Court: Any redirect?

Mr. Pittle: I have nothing further, Your Honor.

(Whereupon the witness withdrew from the witness stand.)

Mr. Pittle: Will you call Mr. Denetsone, please?

Whereupon

Leo Denetsone.

having been called as a witness by the Defendant, and having been duly sworn, took the stand, was examined and testified as follows:

Direct Examination

By Mr. Pittle:

Q. Your full name is Leo Denetsone? A. Yes, sir.

Q. And will you spell that, please, for the reporters A.
D-e-n-e-t-s-o-n-e.

Q. And you live at Window Rock, Arizona? A. Yes, sir.

Q. What is you position, Mr. Denetsone? A. My
196 position is Administrative Assistant to the Tribal
Chairman.

Q. Of the Navajo Tribe? A. Of the Navajo Tribe.

Q. How long have you occupied that position? A. Since
1963.Q. And what did you do before becoming Administrative
Assistant to the Chairman? A. I was Assistant to the
Mining Engineer also in the Tribal Government.

The Court: Will you speak a little bit louder, please?

By Mr. Pittle:

Q. You were Assistant to the Mining Engineer in the
Tribal Government? A. Yes.Q. Will you state briefly your educational background,
please? Where did you go to school? A. I went to school
and finished at the Navajo Methodist Mission School at
Farmington, New Mexico. I attended four years at Wheaton
College in Illinois, majoring in Geology. I attained a B.S.
Degree in Industrial Arts in the field of Structural Engi-
neering at the Arizona State University.Q. How long have you been at Window Rock work-
197 ing for the Navajo Tribe altogether? A. Since 1955.Q. Will you state briefly the details of your present
position as Administrative Assistant? A. My details are
receiving the people that call at the Chairman's office, both
Navajo and Ogala, screening them and referring them to
proper offices. Likewise screening various business pro-
posals and inquiries.

Q. In the form of correspondence, do you mean? A. Yes, sir. I do a great deal of correspondence for the signature of the Chairman and the Vice Chairman.

And also other assignments that the Chairman gets.

Q. All right. Now, after becoming Executive Assistant in 1963 to the Chairman of the Tribal Council, did you become familiar with the affairs of the Navajo Government? A. Yes, sir.

Q. Were you assigned to investigate the attorney, Mr. Littell's contract with the Navajo Tribe? A. Yes, I was assigned to examine the contract.

Q. By whom? A. By the Chairman, Mr. Nakai.

Q. What did you do? A. I took the contract and went through it, and checked it with the authorized resolutions, and to some extent checked with the verbatim minutes of the Navajo Tribe.

Q. Verbatim what? A. Verbatim minutes.

Q. Minutes of the Tribal Council? A. Yes, sir.

Q. Minutes of the Advisory Committee? A. Yes, sir.

Q. At this point may I ask you to describe briefly, if you know, the manner of adopting amendments to the contract? Did you ascertain how these were accomplished? A. Yes, sir.

Q. Would you explain how that was done from your investigation in January? A. The minutes were authorized by the Tribal Council resolutions pursuant to which the amendments were made, the amendments to the contract.

Q. Were drafted? A. Were drafted, yes, sir. And then the amendments were sent to appropriate authorities for approval.

Q. And after approval, who executed them on behalf of the Navajo Tribe? A. The Chairman of the Navajo Tribal Council.

Q. Was this, do you recall from your own recollection, authorized by the resolutions generally? A. Yes, sir.

199 Mr. Doyle: If the Court please, at this point I wish to make an objection to this entire line of testimony

on the ground it is irrelevant, and for the same reasons I announced yesterday.

The Court: When was this action taken, approximately? Was the resolution available?

Mr. Pittle: The resolutions are in evidence and, of course, they are the best evidence. I am showing the witness's familiarity with what he did.

The Court: He is testifying with regard to what he did with respect to this contract? The examination he made and, I suppose, leading up to anything he might have said about it to the Chairman?

Mr. Pittle: That is correct, Your Honor. Yes, and this is in the contract. The pertinent ones are in the Plaintiff's Exhibit A.

The Court: The objection is overruled. You may proceed.

By Mr. Pittle:

Q. As a result of your studies, Mr. Denetsone, and your investigation, what did you find with respect to the attorney's contract in general? A. In general that a contract was renewed for ten years in 1957 and that numerous amendments were made to the contract.

Q. Did you make a report to Chairman Nakai of 200 your findings? A. Yes, sir.

Mr. Pittle: May I have Defendant's 1, the resolution?

By Mr. Pittle:

Q. I show you Defendant's 1, Mr. Denetsone, which is a resolution of the Advisory Committee dated June 25, 1963, addressed to the Secretary of the Interior, requesting that he investigate in order to terminate Norman Littell's General Counsel and Claims Attorney contract.

Would you examine that document and tell us if you had anything to do with its preparation? A. Yes, sir. I drafted this resolution.

Q. You drafted the resolution? A. Yes, sir.

Q. At Mr. Nakai's request? A. Yes, sir.

Q. Can you tell the Court whether the findings in the resolution correctly reflect your findings as a result of the investigation you made at Mr. Nakai's request? A. Yes, sir.

Q. Now, during the time that you have been Executive Assistant to the Chairman, did you have occasion to become familiar with the employment of a Mr. Schifter by
201 the Navajo Housing Authority? A. Yes, sir.

Mr. Pittle: Will you please mark this for identification as Defendant's 3?

The Deputy Clerk: Defendant's 3 for identification.

(Defendant's Exhibit No. 3 was marked for identification.)

Mr. Pittle: Being a copy of a contract executed May 3, 1963, by Richard Schifter to the Navajo Housing Authority.

By Mr. Pittle:

Q. I now show you Defendant's 3 for identification, Mr. Denetsone, and ask you if you are familiar with Mr. Nakai's signature, which purports to appear on the last page of this copy? A. Yes, sir. I am familiar with it.

Q. Are you familiar with the matter in which this contract was executed by the Navajo Housing Authority and Mr. Schifter?

Are you looking at the document? A. Yes, sir. This contract was approved by the Navajo Housing Authority, retaining the firm indicated here of which Mr. Schifter is a member.

The fees are indicated here. A small percentage of the total allocation made by the Federal Government for the housing project.

Q. How was the Navajo Housing Authority
202 created? A. The Navajo Housing Authority was created by the Navajo Tribal Council to obtain monetary allocation from the Federal funds; namely, the Public Housing Administration, to qualify the Navajo Tribe, first for the project.

And it is designed that they administer the housing project.

Q. Do you know the circumstances under which Mr. Schifter was retained or recommended to the Navajo Housing Authority for employment by it? A. Yes, sir.

Q. Will you explain, please? A. Mr. Schifter had worked on this project and helped us, the Chairman and myself and others.

The Chairman and myself and others, who promulgated this project in efforts to obtain the Public Housing project for the Navajo people.

Q. Can you tell me on whose recommendation he was retained? A. Firstly, an employee, one Vernon Buggee.

Q. Will you spell his name, please, for the reporter? A. B-u-g-g-e-e.

The Court: B what?

The Witness: B-u-g-g-e-e.

By Mr. Pittle:

Q. You say he was an employee of what, or whom?
203 A. He was employed by the Chairman as an Administrative Analyst, hired by the Chairman to help us out.

When it came to the matter of PHA project, we used Vernon Buggee to get appropriate help, and this is how Mr. Schifter came into the picture.

Q. Did you have occasion to learn of Mr. Schifter's previous activities in the housing field? A. Yes, sir. Again, largely through Mr. Buggee we learned that Mr. Schifter did a great deal. In fact, he got the first program to apply to an Indian tribe. That was the Ogala in Silux.

Q. Now, after Mr. Schifter was retained or employed by the Navajo Housing Authority, was an application made for the housing project? A. Yes, sir.

Q. Can you tell us who made the application? It was the Navajo Tribe or the Navajo Housing Authority? A. The Navajo Housing Authority made the application for the project.

Q. And what happened? A. The Federal Government allocated to us 500 units, that is 500 houses, or \$7,000,000 worth of housing to the Navajo people.

Q. Will you again look at Defendant's 3 for identification, on the last page? You will note the signature again of
204 Mr. Schifter and Mr. Nakai in the lower left-hand corner on the copy, and you will see the words seal and attest, Peter Yazzi, Y-a-z-z-i? A. Y-a-z-z-a, yes, sir.

Q. Is there any significance to the attestation on the contract? A. Yes, the Chairman signed on behalf of the Navajo Housing Authority. When this Authority was established by the Navajo Tribal Council, the Chairman, that is Mr. Nakai, was made the Chairman of this Housing Authority. Therefore, he had authority to sign on behalf of the Housing Authority.

Q. Do I understand the attestation so approves? A. Yes, sir, that is right.

Q. Are you familiar with the manner in which Mr. Schifter has been paid under that contract? A. Yes, sir.

Q. Is he paid out of tribal funds? A. No, sir.

Q. How is he paid? A. Mr. Schifter is paid a small percentage of the total monetary allocation from the Federal Government under the Public Housing Administration. I believe that is the standard covering the United States.

Q. He is not paid through the Bureau of Indian
205 Affairs, then, I take it? A. No, sir.

D. Do you know Mr. Barry DeRose? A. Yes, sir.

Q. Tell us briefly who he is as far as you know. A. Mr. Barry DeRose is an attorney from Gallup, Arizona. I know that he is a legal counsel to the White Mountain Apache Tribe, and that he has assisted us.

Q. Do you know whether he had anything to do with the creation of the Navajo Housing Authority or the application for housing by it? A. Mr. DeRose assisted us in creating the Housing Authority.

Also, he assisted us in the Tribal Council in pushing this ordinance through.

Q. The ordinance created in the Navajo Housing Authority? A. Yes.

Q. Do you know whether Mr. DeRose was ever employed or retained and paid by the Navajo Tribe or the Navajo Tribal Housing Authority? A. He was not paid by the Navajo Tribe.

Mr. Pittle: Plaintiff's exhibit, being a contract, Plaintiff's Exhibit R.

By Mr. Pittle:

Q. Mr. Denetsone, I show you Plaintiff's Exhibit R 206 for identification, purporting to be a resolution of the Advisory Committee of the Navajo Tribal Council, 31 May 1963, attached to which is a contract purportedly executed June 17, 1963, and it is signed by Raymond Nakai, Chairman of the Navajo Tribal Council, Barry DeRose, and the firm of Strasser, Spiegelburg and so forth, signed by Allen Wurtzel, and tell me if you recognize any of the signatures first. A. Yes, sir. I recognize the Chairman's signature.

Q. The Chairman's signature is valid, as far as you know his signature? A. As far as I know, this is his signature.

Q. You will notice the absence of the attestation on the contract? A. Yes, sir.

Q. Are you familiar with the resolution or this contract? Have you seen these before? A. Yes, sir.

Q. Will you explain to us whether those contracts were ever actually accepted, approved or delivered and became operative between the parties? A. The resolution was passed and these contracts were developed and they were signed, but it was never consummated to my knowledge.

Q. What else would have been required for the contracts to have been consummated, if you know? A. I believe 207 in its prepared form it required, at least one of these documents, I believe, required the approval of the Bureau of Indian Affairs.

Q. Do you know whether it was ever submitted to the Bureau of Indian Affairs, Plaintiff's Exhibit R for identification? A. I don't remember, sir.

Q. All right. Are you familiar with the payroll practice of the Navajo Tribe since you have become Executive Assistant to the Chairman? A. Yes, sir. In general terms it is this way: The Navajo Tribe has funds in the United States Treasury here in Washington.

From this Treasury it draws bi-monthly estimated amounts which are deposited in private banks, private local banks, from which payroll and other uses of the Tribal funds are drawn from.

Q. Can you tell us under what procedure or authority the money is drawn from the Treasury? A. Yes, sir. The Navajo Tribe, the Executive Board, submits their estimates for the coming year, fiscal budget.

Q. Fiscal budget, did you say? A. Yes, sir.

Q. Proceed. A. They are approved then by the Budget and Finance Committee of the Navajo Council, and
208 then they are approved by the Tribal Council, and again approved by the Bureau of Indian Affairs.

Q. And then, do I understand, upon approval by the various bodies that you have mentioned, the estimates are available to be drawn on bi-monthly during the following year? A. Yes, sir.

Q. Now, how are the General Counsel attorneys paid who are employed by the Navajo Tribe? A. The Navajo Tribe attorneys are paid from these funds, much in the same manner as other employees, only they are paid once a month.

Q. Are they required to submit vouchers or other evidence entitling them to be paid? A. Yes, sir. By Federal regulations they are required to formulate service records which accompany the voucher, which has to be approved by the Chairman, and approved also by the Bureau of Indian Affairs.

Q. And upon approval by the Chairman and the Bureau of Indian Affairs, how are the attorneys paid? A. The documents are then returned back to the Chairman. We route them back to the legal office, and their personnel take them to the Accounts Payable, the Finance Section of the Tribe, at which time the checks are made and the secretaries mail them out or hand them over to the attorneys.

209 Q. All right, sir.

This past year were vouchers submitted for payment for the services of the plaintiffs in this case under his General Counsel contract, were they not? A. Yes, sir.

Q. And do you know whether these were held up or paid promptly? A. They were held up, sir.

Q. Were you directed to hold them up or did you hold them up? A. I held them up, sir.

Q. Were you directed to do so by the Chairman? A. He had knowledge of it, yes.

Q. You took the matter up with him? A. Yes, sir.

Mr. Pittle: Pardon me just a minute, Your Honor, please.

By Mr. Pittle:

Q. Now, Mr. Denetsone, if I may go back to your investigation and examination of Mr. Littell's contract, and various amendments, and I will refer particularly to Amendment 11.

I will show you Plaintiff's Exhibit A, beginning on Page 100, where Amendment 11 to the contract is set forth.

210 Can you examine that and tell us whether this is the amendment that you looked at during your investigation? A. Yes.

Q. It is. Now, you will note on Plaintiff's Exhibit A, Page 103, under Paragraph 3(c) of Amendment 11 —

The Court: What page number is that?

Mr. Pittle: 103 of Plaintiff's A, Your Honor.

By Mr. Pittle:

Q. It is provided that the second paragraph of Section 4(b) of the 1957 contract is to be amended to provide for

the prosecution of claims which have since been developed and set forth in separate proceedings, including Healing versus Jones, and the Navajo Tribe of Indian Affairs versus the State of Utah.

Did you notice that Amendment 11 during the time of your investigation? A. Yes, sir.

Q. Now, I direct your attention to a resolution beginning on Page 108 of Plaintiff's A, being Resolution CF-17-62.

Q. Did you examine and study this resolution in connection with your investigation? A. Yes, sir.

Q. Did you note that the Resolution CF-17-62 provides merely for the employment or retainer of Leland Graham, for General Counsel of Claims Services and for increases in compensation for Robert Walton? Did you notice that? A. Yes, sir.

Q. Did you find any reference to authorization that Healing versus Jones be considered a claims case and that the 1957 contract be amended accordingly? A. No, sir.

Q. Will you explain, if you will? A. First of all, the resolution CF-17-62 specifically authorized just two amendments. That is the retention of an attorney, Mr. Leland Graham, and then raising of compensation for another attorney already employed by the Tribe, Robert Walton.

Q. The resolution authorized an amendment be made accordingly? A. Yes, sir.

Q. And did it authorize the execution of such an amendment by the Tribal Chairman? A. Yes, sir.

Q. All right, sir. Then what happened? A. Then I noticed the discrepancy, what I considered a discrepancy, or what I believed are discrepancies of a serious nature occurred.

Namely, Amendment 11, which did several things. It relieved the attorney. It relieved the claims attorney from paying the attorneys which assisted him in claims cases from his own pocket.

Q. Where was that shown in the amendment, Mr. Denetsone? The provision you are referring to, if you can

find it quickly? A. I am more familiar with the contract itself. It is in Section (b) of 3.

Q. B being on Page 103 of Plaintiff's A? A. Wherein I deleted the phrase which said C. J. Alexander and other associate attorneys retained by the said Littell at his own expense.

Q. The phrase at his own expense was deleted? A. Yes.

Q. What other discrepancies, if any, did you note? A. The most serious one I found is in Section (c) on the same page, wherein it included the Healing versus Jones as claims case, as well as the State of Utah and against the Navajo Tribe.

I felt that this was important because it was not authorized in the resolution which authorized this amendment.

Q. All right. Now, did you note any changes in the payment of compensation for the General Counsel in your investigation between his 1957 contract and Amendment No. 9? A. Yes, sir.

Q. All right. Now, in the 1957 contract you noted that Mr. Littell was retained at a fee of \$25,000 per annum; is that correct? A. Yes, sir.

Q. This is on Page 38 of Plaintiff's Exhibit A. Now, did you note on Page 40(b) of Plaintiff's A, under Paragraph 4(a), the ultimate paragraph of 4(a), the provision provided, however, that any —

The Court: What page are you on?

Mr. Pittle: Page 40, Paragraph 1.

The Court: What part?

Mr. Pittle: The last—the middle paragraph just above B. From and after the approval by the Commissioner of Indian Affairs, the compensation for the attorneys of the general counsel services may be increased by providing in the Tribal budget for any such increase.

Provided, however, that any such increase in compensation shall not take effect until such time as the Tribal budget has been approved by the Tribal Council and the Commissioner of Indian Affairs.

Provided, further, that there shall be no change in the compensation of Mr. Littell and Mr. Alexander during the first five years of their contract.

214 Did you note that in respect to your investigation?

A. Yes, sir.

Q. Now, with respect to Amendment Number 9, you noted that the compensation of Mr. Littell on page 91 of Plaintiff's A was increased to \$35,000 a year in August of 1961, less than five years after the execution of said contract.

Is that correct? A. Yes, sir.

Q. And the resolution — I don't know that we find the resolution readily available here.

Mr. Doyle: Page 133.

Mr. Pittle: Thank you.

By Mr. Pittle:

Q. The resolution on page 133 of Plaintiff's A authorized that increase.

You noticed that, did you not? A. Yes, sir.

Q. Now you mentioned earlier in your testimony that during this investigation you had occasion to examine minutes of the meetings of the Tribal Council, and the minutes of the meetings of the Advisory Committee?

215 Would you tell us, did anyone else assist you in your investigation or examination of those minutes?

A. I asked for and got the assistance from my wife, one of the legal secretaries, to help me in this project.

Q. And where were the minutes of the meetings maintained? A. They were maintained in the Records Department of the Navajo Tribe as well as the Reporting Department.

Q. About how long did you spend in reviewing the minutes of these various meetings, Mr. Denetsone, with relation to Amendment 9 and Amendment 11? A. I spent quite a little bit of time on it.

Q. Can you estimate? Was it a week or a month or more?

A. Probably two weeks, at least.

Q. You would say two weeks full time? A. Yes, about that.

Q. Now, did you find anywhere in your examination of the minutes of the meeting of the Tribal Council, that a disclosure or explanation had been made to the Council prior to the adoption of Amendment 9, explaining that the original contract provided that no increase in compensation should be made for Mr. Littell's retainer during the first five years? A. Oh, will you repeat that again, please?

Mr. Pittle: Will the reporter read it?

(Question read.)

216 The Witness: No, sir, I didn't find any evidence of disclosure.

By Mr. Pittle:

Q. In your examination did you find any explanation or disclosure to the Tribal Council that the resolution authorizing the employment of Leland Graham and increasing the compensation of Robert Walton was to include a provision changing the category of Healing versus Jones into a claims case?

Mr. Doyle: I object to that question. This is contrary, I believe, to the terms of the resolution and the terms of the contract.

The Court: Well, isn't the resolution the best evidence?

Mr. Pittle: I withdraw it. The resolution speaks for itself.

The Court: I think we will take out morning recess now.

(The Court recessed at 11:05 and reconvened at 11:20.)

AFTER MID-MORNING RECESS:

The Court: All right.

By Mr. Pittle:

Q. Mr. Denetsone, in your examination of the minutes of the meeting of the Tribal Council, Advisory Committee,
217 tee, did you find any explanation had been made to those bodies that the contract had been amended to

change the category of Healing and Jones into a claims case, and the compensation of the attorney to a percentage of the claim instead of his annual retainer?

The Court: Excuse me. The Advisory Council is composed of nine members?

Mr. Pittle: The Advisory Committee up until October —

The Court: What you are talking about is the Advisory Committee of nine members and seventy-five members of the Tribal Council? You are referring to the Advisory Committee now?

Mr. Pittle: The Advisory Council and the Tribal Council. I asked about both.

By Mr. Pittle:

Q. As I understand your testimony, you examined both minutes of the 74-member Tribal Council and the minutes of their meetings, Mr. Denetsone? A. Yes.

Q. And you examined minutes of the meetings of the Advisory Council, of the nine-member Advisory Committee? A. Yes.

Q. And you found no explanation why the contract had been amended to change the category of Healing
218 versus Jones? A. No, sir.

Q. Now, as a result of your investigation and your examination of these documents, and the minutes of meetings, in your report to Chairman Nakai what significance did you attach to the change in the category of Healing versus Jones and the resolution authorizing Amendment No. 11? A. Sir, I stressed to the Chairman the importance of the far-reaching effect of this alteration of the amendment as it concerned the Healing versus Jones case.

Q. Can you give us a little more detail of what you mean by the far-reaching effect? A. Yes, sir. Presently and at this time on the reservation we have within the area of the Healing versus Jones deposits of coal which are known to be in existence, and at this point we have one company proposing to large power companies, mainly on the West

Coast, for a power project, using the Navajo Tribal coal, or I should say using coal from this area which is covered by Healing versus Jones.

Q. You mean the land involved in the Navajo Valley Dispute which is Healing versus Jones? A. Yes. The company, after studies, after spending \$1,000,000 approximately of exploratory drillings, can competently and has bid to the power companies to furnish for a proposed power plant, to utilize at least 200,000 tons of coal.

219 Now, in my mind I felt that this merited a full disclosure because the lands from which the coal was to come from would definitely affect the fees of our claims attorney, or General Counsel, Mr. Littell.

Because we get an average of 25 cents per ton, 300,000,000 more would give us—well, it boils down to 25 cents per ton, and the Navajo Tribe's half interest in the future if Littell were to have one percent of this amount, it would total a quarter of a million dollars.

Now, when I looked at it from a different viewpoint of retaining and receiving ten percent of the land values, then I found in my mind he was entitled to 93 acres of this land in the area concerned by Healing versus Jones.

Now, I took that at its values where it was a dollar an acre, it means to the Tribe considerable—in fact, large amounts of money and, therefore, we feel that it calls for a definite disclosure.

Mr. Wiener: I object to the conclusion, we feel.

The Court: He can testify to what he knows of what he did.

Mr. Pittle: Your Honor, I think this goes to the evidence in his report. I am not trying to prove a fact.

The Court: Why he can testify to what he knows he did. Let him go ahead.

The Witness: The Navajo Tribe is entitled to be
220 told that large amounts of money were involved in this. I can go far beyond. We now have three companies that have studied additional areas in this area of

controversy between the Hopis and Navajos. We have three estimates from three mining companies of three additional hundreds more tons of stripable coal, and according to this amendment, the changing as to the posture of this case, then the attorney stands to gain additional amounts.

I am talking only of stripable coal, not touching on the underground mining reserves. And then every geological of the oil companies, Mr. Littell, himself, claims that this area has one of the greatest potential of oil and gas reserves from geological study. And this money that the Tribe might receive has great bearing on the posture of this case, and therefore, the Navajos are entitled to be told as to the far-reaching affect as to what additional moneys are involved.

By Mr. Pittle:

Q. All right, sir.

Now, if we may go back to the earlier part of your testimony, after you became employed in the Tribal Government, that was about 1955, as I recall, and you became Executive Assistant to the Chairman in 1963. You were at Window Rock all this time?

The Court: Excuse me. Let me follow that.

221 When was he first employed by the Tribal Government?

By Mr. Pittle:

Q. By the Tribal Government in 1955, in the Mining Department, as Assistant? A. Yes, sir, to the Mining Engineer.

Q. To the Mining Engineer; and in 1963 you became Executive Assistant to the Chairman of the Tribal Council? A. Administrative Assistant to the Chairman, yes, sir.

Q. Do you remember what date? What date in 1963, approximately? A. I don't remember the exact date, but shortly after the Chairman's inauguration.

Q. Which was in April? A. Yes.

Q. Now, during this time your were living at Window Rock? A. Yes, sir.

Q. Did you have occasion to become familiar with Tribal politics, and particularly the campaign of 1963 which resulted in Mr. Nakai's election as Chairman- A. Yes, sir.

Q. How did you become familiar with that? Did you take an active part in the campaign? A. No, sir.

Q. Did you follow the issues of the various candidates? A. Yes, sir.

Q. Will you tell us what were generally and briefly and who the candidates were? A. The candidates were Mr. Jones, the incumbent, Mr. Samuel Billison, and Mr. Nakai.

Q. Can you tell us about the issues of the campaign as they may have related to the General Counsel contracts in this case? A. Yes, sir. Specifically in the present Chairman, Mr. Nakai, wherein he raised a question concerning this Hopi case. That the attorney had not revealed to the Navajo Tribe the true results of the case and as to what the Navajo Tribe was now entitled to resulting from the case.

Q. Now, when you say that he charged that the attorney had not revealed the true results of the case, does this have anything to do with changing the category of the case from the claims case, from General Counsel case to claims case, about which you were talking a few minutes ago? A. No, sir.

Q. What does it mean? A. The Navajo Tribe to this day are still puzzled about the case.

Mr. Doyle: I object. I move to strike his testimony about the Navajo Tribe.

The Court: Well, I do not think he can speak for about a hundred thousand people. He can testify what the issues were, and the result of the election, and anything he knows of his own personal knowledge.

By Mr. Pittle:

Q. Will you do that please? A. Nevertheless, it was a campaign issue and also another one I remember vividly is the matter of the livestock problem.

Q. What was that? A. Of the Navajo Tribe.

Q. And will you explain the livestock problem? A. The problem is that of Navajo—the problem is that all Navajos are emotional about this problem in view of the past history.

Mr. Doyle: I object. Again I move to strike.

The Court: Objection is sustained.

By Mr. Pittle:

Q. Just explain the livestock problem you have mentioned. What happened? What is it? A. The Navajo Tribe lost their livestock. It affected their economy and the Navajos were told by the Chairman that our present General Counsel has a definite mark in this program which injured the economy of the Navajo Tribe.

Q. Is this during the campaign? A. Yes, sir.

224 Q. Can you tell generally what they were told?

What was the issue and what was the campaign statement? A. The campaign statements were that Mr. Littell, while on the service in the Government, authorized by his opinion the accomplishment or the reduction of livestock of the Navajo people.

Q. Why do you consider this wrong? Or harmful, or why did Mr. Nakai? Was it explained? A. It was harmful because Mr. Littell to this day still explains to the Navajo people this was solely the project of the Federal Government.

Q. What branch of the Federal Government, if any, if you know? A. The Bureau of Indian Affairs.

Q. When did the campaign resulting in the election of Mr. Nakai, when did that campaign begin? Approximately how much before March of 1963 did the campaign start? A. In the case of Mr. Nakai, he campaigned many years before.

Q. Many years before? A. Yes, sir.

Q. Can you give me a few details of what he said? A. First of all, he was unsuccessful in getting the Chairmanship at the last election, that is prior, the four years prior to his 1963 election.

225 Q. And during that time do I understand he was still campaigning for the Chairmanship in the 1963 election? A. Yes.

Q. And in the campaign, how did he do this—did he write articles or make speeches? How was it evidenced? A. Both by articles and circulars, that is through news media, as well as speeches before the communities on the reservation.

Q. Were you present when Mr. Nakai made his inaugural address in April of '63? A. Yes, sir.

Q. Can you tell us in generality whether the statements at the inaugural address followed his commitments in his campaign with respect to the General Counsel's continued employment? A. Yes, sir.

Q. What were they, in general? A. Do you mean, sir—

Q. What were the statements in general with respect to the General Counsel's employment, briefly? A. That he will turn to his legal advice only for legal counseling.

Q. Did he make any statements with respect to Mr. Littell's continued employment by the Tribe at that time? A.

Not at the inauguration.

226 Q. Did he do that in the campaign? A. Yes, sir.

Q. What did he say in general? A. That he promised the people that he would evaluate the contract and that he would make appropriate moves.

Mr. Pittle: I have no further questions. Oh, pardon me. I would like at this time to offer into evidence Defendant's 3 for identification, which is the Schifter contract.

Mr. Doyle: No objection.

The Court: Received.

(Defendant's Exhibit No. 3 for identification was received into evidence—Schifter's contract.)

The Court: Mr. Doyle, any cross?

Cross Examination

By Mr. Doyle:

Q. Mr. Denetsone, I show you Defendant's 1, being the resolution of June 25, 1963, and ask you if you wrote that resolution? A. Yes, sir.

Q. Now, are you an attorney? A. No, sir.

Q. Did you ever study law? A. No, sir.

Q. Prior to the time that you wrote this resolution,
227 did you obtain any legal advice about its wording?

A. Yes, sir.

Q. From whom? A. Mr. DeRose, for one.

Q. And who for another? A. I believe that was all.

Q. Did Mr. Wurtsel, did you consult with Mr. Wurtsel?

A. No, sir.

The Court: May I see it?

Mr. Doyle: Yes, indeed.

Q. How about Mr. Schifter? A. No, sir.

Q. When and where did your conference with Mr. DeRose
take place? A. Mostly over the phone.

Q. And when? Keep in mind that this is dated June the
25th.

The Court: That is the date of the resolution?

Mr. Doyle: Yes, sir.

The Witness: I can't give you the exact date.

By Mr. Doyle:

Q. Approximately? A. Shortly before that; before the
passage of the resolution.

228 Q. Did you originally write a draft? A. Yes, sir.

Q. And turn the draft over to him? A. I don't re-
member whether we handled this over the phone or I had
him look at it. I don't remember.

Q. All right. Now, in the first conversation you had with
him, this time it was only as to form, and what did you say
to him and what did he say to you? A. I cannot be that
specific as to the first conversation.

Q. How many conversations were there, three, more than
one? A. I am sure there were more than one.

Q. Less than five? A. I am sure there was more than five.

Q. More than five. How many would you say, approxi-
mately, meetings with Mr. DeRose did you have concerning

this resolution? A. This is three years ago. I couldn't have a memory to state exactly how many.

Q. There were more than five. Can you tell us what you discussed with Mr. DeRose during these meetings or any of them? A. I asked him the various aspects to the contract.

Q. You took the contract over to him? A. He's seen it, yes, sir.

229 Where did this meeting take place, where he saw it? A. This is three years ago, sir.

Q. I know, but to the best of your recollection. A. Probably in Window Rock.

Q. And did you show him the resolutions as well? A. Yes, sir.

Q. Did he examine with you the contract and the resolution? A. Yes.

Q. And what did he say concerning them to you? A. I asked him if it was proper and showed him the resolution. They are all in one book. And I asked him if he conformed with the subsequent amendment.

Q. And did he take the contract with him to study it further? A. I don't remember.

Q. Well, let's see. This is a year and a half ago, isn't it? A. Yes.

Q. And it wasn't three years. It is a year and a half.

Now, the analysis of Healing versus Jones that you have made of that resolution on Paragraph 9, the purpose of the Healing versus Jones case is not to acquire property or compensation from the United States or its officers, within the meaning of Paragraph 2(b) of the Tribal-attorney contract.

230 Did you discuss Healing versus Jones, that aspect of it, with Mr. DeRose? A. Yes, sir.

Q. And what did Mr. DeRose say? A. He concurred in my opinion that it was not a claims case.

Q. Did you examine 174 Federal Supplement on Page 211, the original opinion of the Court on Healing versus Jones? A. Which Court?

Q. The three-judge court for the District of Arizona in which Heling versus Jones was tried? A. It had only four point judgment.

Q. Did you examine the report in 174 Federal Supplement before you arrived at your conclusions? A. I read the book.

Q. Which book? A. I read the blue book which they published.

Q. Do you know what 174 Federal Supplement is? A. I don't know which one it is.

Q. Do you know what it is? A. Not the specific book or the section.

Q. Did Mr. DeRose say anything to you about the opinions, the opinion in 174 Federal Supplement? A. I don't remember.

Q. Did Mr. DeRose—did you have the opinion of
231 the Court in 210 Federal Supplement before you came to your conclusion concerning Healing versus Jones?
A. I don't remember the exact content in that.

Q. Did Mr. DeRose give you an opinion concerning the effect of those two opinions of the Court? A. He went by the judgment of the Court.

Q. Did you examine the Court's opinion? A. Yes.

Q. Now, you were appointed on April 25—you were appointed shortly after Mr. Nakai's inauguration, were you not? A. Yes, sir.

Q. And he was inaugurated on April the 25th; is that correct? A. Somewhere near that date, yes, sir.

Q. And so you started your work about a week after; is that correct? A. Yes, sir.

Q. Did your job have to be cleared by the Tribal Council—does your appointment have to be confirmed by the Tribal Council? A. No, sir.

Q. So you were appointed by the Chairman alone, is that correct?

The Chairman appointed you and your appoint-
232 ment did not require any confirmation; is that correct? A. Not from the Tribal Council.

Q. Mr. Nakai directed you to examine into the contract between Mr. Littell and the Tribe after your appointment as Administrative Assistant.

When did he tell you to start examining the contract?

A. I was the coordinator for him before he was inaugurated, and I believe I helped him then too.

Q. Did you examine the contract, then, before the inauguration? A. I have looked at it many times, yes.

Q. Prior to the inauguration? A. Prior and after.

Q. Prior to the inauguration, did you consult with Mr. DeRose on it at all? A. No.

Q. Did you consult with Mr. Larry Davis on it? A. No, sir.

Q. With any other attorney? A. No, sir.

Q. Then you were appointed and you made your investigation. Now, did you report the results of your investigation to Mr. Nakai? A. Yes, sir.

Q. Prior to the time that you reported the results
233 of your investigation to Mr. Nakai, had you conferred with Mr. DeRose that you mentioned? A. I talked with many people.

Q. Yes, but Mr. DeRose, about this contract and about your investigation? A. Yes, sir.

Q. Now, after you had shown the results of your investigation and the suggestions or advice with the suggestions and advice of Mr. DeRose to the Chairman, did you appear before the Advisory Committee of the Navajo Tribal Council in this regard? A. I don't believe I was there when that particular resolution was passed. At least I don't remember being at the meeting at that time.

Q. This is June the 25th, the June 25th resolution? Did you appear before that Advisory Committee prior to June the 25th, prior to the time that it passed concerning the resolution here, the material contained therein? A. I don't remember.

Q. Who were the members of that Advisory Committee? A. Mr. Luther, Mr. Todacheene, Mrs. Hesuse, Mr. Littell, Mr. Damon, Mr. Smith, and others.

Q. Are any of them lawyers? A. No, sir.

Q. As a matter of fact, Mrs. Hesuse was a new
234 member, wasn't she, of the Advisory Committee? A.
Yes, sir.

Q. And had never been on the Council before, had she?
A. That is right.

Q. Mr. Todacheene was a new member on the Council, was
he not? A. Yes, sir.

Q. Mr. Luther was a new member on the Council, was he
not? A. Yes, sir.

Q. Mr. Damon, the Vice Chairman, had been a Council-
man before, I believe? A. I believe, too.

Q. Mr. Harvey was new, was he not? A. I believe so.

Q. Mr. Smith? A. Was new.

Q. He was new. Who explained all of these matters to this
Advisory Committee? A. I did many times. I explained to
them to the best of my ability many times.

Q. All right. When was the first time? A. I didn't keep
track of them all.

Q. Approximate, then.

The Court: Speak a little louder, please.

235 The Witness: I talked to these people constantly
like even as I do now.

By Mr. Doyle:

Q. And it was so constantly, so let's have the first time
and the size of the meeting and the place and date.

Mr. Pittle: I object. The question is now confusing. The
witness has answered and the witness said he spoke to these
people many times. He didn't say in formal meetings.

The Court: If he remembers when he first spoke to them.

By Mr. Doyle:

Q. Do you remember when you first spoke to them about
it? A. No, sir.

Q. Then it must have been after April 20, must it not?
A. Somewhere in that neighborhood.

Q. It must have been before June the 25th? A. Yes, sir.

Q. Now, you say there were so many meetings that occurred within that period of time, didn't you? A. Yes, sir.

Q. At any time and at any of these meetings at which this matter was discussed and presented, were there minutes taken? A. In official meetings, yes.

Q. Meetings at which the discussion of this appears? This resolution appears in the discussion of the material contained in it? A. At the official meeting, yes.

Q. When was the official meeting, to the best of your recollection? A. On the date the resolution was passed.

Q. You were not present on that date? A. I don't believe so.

Q. So you didn't present your material on that date, did you? A. I wasn't there, I didn't know.

Q. Mr. Denetsone, who else was present with you at any meeting at which you were present between those dates of April the 20th and June 25th? A. Any number of people who were present at many meetings we have had.

Q. Did Mr. DeRose appear at any of those meetings? A. Yes.

Q. Did Mr. DeRose explain any of the material which resulted in the June 25th resolution? A. Yes, sir.

Q. Would you tell the Court what the explanation was given by Mr. DeRose at the meeting? What did he say to them? A. I am sure he said that the amendment did not conform with the authorizing resolution.

Q. When you examined the vouchers of Mr. Littell that you mentioned on direct examination, who, if anyone, directed you to hold the vouchers? A. I conferred with the Chairman.

Q. Did you confer with Mr. Landbloom, perhaps? A. No.

Q. Mr. Young? A. No, sir.

Q. Any other member of the Department of the Interior? A. No, sir.

Q. They were finally paid, I understand. Were the vouchers finally paid? A. Yes.

Mr. Doyle: Your Honor, would you please bear with me for a minute?

Counsel may examine.

The Court: Is there anything further?

Mr. Pittle: I have nothing further of this witness.

The Court: Well, I have a few questions.

Mr. Denetsone, did you make a written report to Mr. Nakai or an oral report regarding your investigation of this contract which we have been talking about?

The Witness: Your Honor, I made my report orally.

238 The Court: When did you make a report orally to Mr. Nakai?

The Witness: We have studied even together the contents of the contract, together many times.

The Court: Well, what did you tell him about the contract? That is insofar as what your investigation disclosed.

The Witness: I told Mr. Nakai that in this one instance that Amendment 11, that it did not conform with the authorizing resolution.

The Court: Now, how many times did you confer with Mr. Nakai concerning your investigation, what you found as a result of examining the contract?

The Witness: Your Honor, I conferred with him many times.

The Court: You first started to work on this matter, I understand, after the inauguration of Mr. Nakai, correct? Or was it before that?

The Witness: We talked about the contract before his inauguration and he assigned me to do this work after the inauguration was made.

The Court: You had no legal experience, I understand? That is right?

The Witness: No, sir.

The Court: You are not a lawyer?

239 The Witness: No, sir.

The Court: You did talk to Mr. DeRose about this matter from time to time?

The Witness: Yes, sir.

The Court: Did you tell Mr. Nakai what Mr. DeRose had said about the contract?

The Witness: Not necessarily.

The Court: You knew, did you not, I take it, that Mr. Littell had been serving as counsel for the Tribe since, I believe, 1947? Correct?

The Witness: Yes, sir.

The Court: At anytime prior to the time when you were requested by Mr. Nakai to make an examination or investigation regarding this contract, to your knowledge in 1955 had any complaints ever been made against or about Mr. Littell's services in this respect, that he was either dishonest, or he was cheating the Tribe, or the Navajo Indians? Had you ever heard anything like that against him?

The Witness: Yes, sir.

The Court: You had heard that?

The Witness: Yes, sir.

The Court: Do you know whether or not any action had been taken by the 74 members of the Council? I am not talking about the Advisory Committee. I am talking about the governing body, at the time you became connected with the Tribe in 1955 to the time that you were designated to make the investigation at the request of Mr. Nakai?

Had he ever been before the Committee on any kind of charges during that period? I am talking about the 74-member council.

The Witness: No, sir.

The Court: Do you know they had not?

The Witness: No, sir.

The Court: I take it you were familiar with this clause of the contract. You say you had examined this contract on numerous occasions. That is correct, isn't it?

The Witness: Yes, sir.

The Court: Do you have a copy of the contract? Can you give a copy to the witness?

Mr. Pittle: He has it in front of him.

The Court: Refer to Paragraph 12, please.

The Witness: Yes, sir.

The Court: Where I will read Paragraph 12, it says termination (a) Tribal Council may terminate this contract for a good cause shown with respect to any one or of the second parties' services as General Counsel after giving sixty days' notice to any of the second parties in respect to which the termination is sought.

The said termination to become effective upon approval of the Commissioner of Indian Affairs. Provided,
241 however, that in the event of disagreement between parties as to the sufficiency of the cause, the question shall be submitted to the Secretary of the Interior. In such event the parties of the second part, or any one of them so terminated, shall receive compensation on the basis of the annual retainer provided for in Paragraph 4 above prorated to the date of termination, together with such sums as may be properly due for expenses incurred prior to the date of termination.

Provided, further, that if the services of Norman M. Littell and C. J. Alexander as General Counsel were so terminated by the requesting first party, the said Littell and Alexander, and their assigns, if any, shall have the option to terminate the contract in its entirety. Subject, however, to the provisions of Paragraph (b) hereof.

Now what did that paragraph mean to you when you considered it?

The Witness: Your Honor, this paragraph meant to me that the Tribal Council had the right in this contract to take action on the matter of terminating the General Counsel and its staff.

But we felt that since our counsel are not attorneys, since we didn't have attorneys that we could place confidence in, and since the General Counsel was the subject, that it was best for proper determination of this question,
242 that it best can be handled by the Federal authorities since they had legal counsel available.

And for that reason it was decided to forward that question about the resolution from the Advisory Committee to the Secretary.

The Court: Well, who made that decision?

The Witness: The Advisory Committee did.

The Court: And none of these persons, as I understand from the questions of Mr. Doyle, had any legal experience. Is that correct? Is that right?

The Witness: Your Honor, that was the reason that we sent that third determination by other authorities than the Tribal body who was without and wherein we didn't have any attorneys in that body.

The Court: Now, didn't you or Mr. Nakai or Mr. DeRose, or anybody involved in the investigation of this contract, and in the interpretation of the contract, have any confidence in the governing body at all, that is the 74 regularly elected members, delegates?

The Witness: This I advised the Chairman that this would result in the Chairman's arguing with the attorney who was the subject, and being that the Chairman was not an attorney, that it would not be fair to argue on the merits before the Council.

The Court: Is there any other place designated in
243 the contract under contracts providing the means
by which the contract could be terminated other than
the Paragraph 12?

The Witness: I don't believe so, Your Honor.

The Court: It is the only reference made to the termination in the whole contract? Right?

The Witness: Yes, sir.

The Court: Did you ever tell Mr. Nakai or Mr. DeRose anything like this: Don't you think it might be better if we took this matter before the whole Council and let them investigate the matter and then give Mr. Littell an opportunity to state his case, instead of going to Washington to see Mr. Barry, and the Secretary of the Interior, about this

matter? Did you ever discuss the advisability of doing that?

The Witness: Yes, as a matter of fact, I did.

The Court: With whom?

The Witness: I remember the Chairman recommending it on one occasion, to take it before the Council.

The Court: Recommended to whom?

The Witness: To the Chairman.

The Court: You say you recommended it to him?

The Witness: Yes, I recommended it once.

The Court: Well, what did the Chairman say about that when you recommended the matter be taken before the Council?

The Witness: At the time I did, I felt that just
244 what I said, that the Secretary had legal talents at his disposal and we didn't. We couldn't use the attorneys there, they were the subjects or were working directly under the subject.

The Court: Did he indicate to you that the only provision of the contract was Clause 12, or did he indicate knowledge of that provision as to how the contract could be legally terminated?

The Witness: Yes, he knew that and we also knew that we were trustees of the Federal Government, under the Secretary of the Interior, that the Tribal Council, Advisory Committee, and the very existence of the Navajo Tribal Council, a governing body, was formulated and established by the Secretary under the Federal authorities. And in fact, it has not been formally approved by the Navajo people themselves.

The Court: Now, whose decision was it to come to Washington to take this matter up with anybody in the Department of the Interior?

The Witness: Sir, I remember coming up three times.

The Court: Whose decision was it in the first place?

The Witness: It was the Chairman and myself.

The Court: Why did he make that decision? What did he say about it?

245 The Witness: We presented our problem to the Secretary.

The Court: Directly to the Secretary?

The Witness: Yes, sir.

The Court: When was that?

The Witness: In June sometime.

The Court: Shortly after the resolution was adopted?

The Witness: Yes, sir.

The Court: How soon after the resolution was it that you spoke with the Secretary of Interior?

The Witness: We were in Washington on or about June the 19th, somewhere in that neighborhood of time, Your Honor.

The Court: That was before the resolution?

The Witness: Yes, sir.

The Court: Whom did you see here in Washington on June the 19th, before the resolution was adopted?

The Witness: We saw the Secretary.

The Court: All right. Who else was present with the Secretary besides you?

The Witness: Can I refer to my notes as to that?

The Court: Yes. I am talking about the meeting of June the 19th, 1963, in the office of the Secretary of Interior, was it?

246 The Witness: Yes. We paid a visit to the Secretary. Mr. Chairman, Mr. DeRose and Mr. Luther were with us.

The Court: Mr. who?

The Witness: Mr. Luther. One of our Council members was with us at that time.

The Court: L-u-t-h-e-r, is that his name?

The Witness: Yes.

The Court: Is he a member of the Advisory Committee?

The Witness: Yes, sir.

The Court: Then this was prior, as I understand it, to the resolution being adopted by the Committee?

The Witness: Yes, sir.

The Court: Was Mr. Nakai there?

The Witness: In the Secretary's office?

The Court: Yes.

The Witness: Yes, sir.

The Court: Who else was present?

The Witness: Mr. Luther, Mr. DeRose, myself, and I believe he had one or two members of his.

The Court: Was any reporter or secretary present at the time making notes?

The Witness: I don't remember, sir.

The Court: Do you recall whether that happened or not?

247 The Witness: I don't believe we had a secretary taking notes.

The Court: Was Mr. Barry there?

The Witness: I can't remember, sir.

The Court: Was anybody else that you can remember there at that conference?

The Witness: We had some other gentlemen in there. I can't remember exactly who they were.

The Court: You have no idea who they were?

The Witness: I can't remember whether it was Mr. Barry or Mr. Harvey or Mr. Carver, or others.

The Court: Was Mr. Zimmerman there?

The Witness: No, sir.

The Court: Do you know Mr. Zimmerman?

The Witness: Yes, sir.

The Court: Now, who arranged for this meeting with the Secretary of Interior, if you know?

The Witness: We did.

The Court: You say we, whom do you mean by we?

The Witness: The Chairman.

The Court: The Chairman personally?

The Witness: Yes, sir.

The Court: By what manner, correspondence with him or calling him on the phone or what?

The Witness: I believe he called him by phone.

248 The Court: I mean to the best of your recollection.

What is your best recollection?

The Witness: He called him by phone.

The Court: Were you there when he telephoned to the Secretary of the Interior for an appointment, if he did do so?

The Witness: No, sir.

The Court: When did you make these notes you have been referring to?

The Witness: Just in the last few days, sir.

The Court: Just in the last few days?

The Witness: Yes, sir; just notes as to when I came to Washington and approximate dates.

The Court: Did you confer with anybody about these notes before you made them?

The Witness: No, sir.

The Court: You made them to refresh your recollection?

The Witness: Yes, sir.

The Court: You made them yourself?

The Witness: Yes, sir.

The Court: In other words, you are now testifying as a result of your independent recollection and of refreshing yourself with the notes that you made regarding this conference with the Secretary of the Interior on June the 249 1963? Right?

The Witness: Yes, sir.

The Court: Now, what was the discussion about there? Who said what? How long did it last?

The Witness: It didn't last very long, sir.

The Court: What was the substance of what was said?

The Witness: We gave them our problem.

The Court: Who gave them? You said we.

The Witness: The Chairman.

The Court: What did he say to the Secretary?

The Witness: That we feel that we have discrepancies here in the contract and we want them clarified.

The Court: In what manner did you want them clarified?

The Witness: We wanted an explanation, whether we were right, and if we were right, we wanted to be informed.

And, of course, subsequent resolution would go further in asking that the Secretary do something about it.

The Court: What did he say to the group or to you or anyone present?

The Witness: He was helpful in listening to our problems and I believe he said that he would help us in whatever way we tried to do in evaluating this.

The Court: In what way, I didn't hear your answer.

The Witness: In evaluating our findings.

250 The Court: Now, up to that time had this resolution been prepared that we are talking about and adopted by the Advisory Committee?

The Witness: I don't remember. I don't believe so.

The Court: When was the first discussion held about the resolution that was adopted on June the 26th, was it, after you visited the Secretary?

The Witness: We were there for a long time, Your Honor.

The Court: Well, how long would you say you were there?

The Witness: Well, what I meant to say, for a long time we were discussing as to how we might have this question clarified, and the matter of the Amendment 11, specifically.

The Court: Give me Amendment 11, please.

Mr. Doyle: Page 100, I believe it is, Your Honor.

The Court: Amendment 9 appears on Page 100 of Plaintiff's Exhibit A. Does it appear on that page?

Mr. Pittle: It starts there.

The Court: Down at the bottom, I have it here.

You are referring to Amendment 10, aren't you?

Mr. Doyle: No, sir; 11 is at the bottom of Page 100 of the joint appendix of Plaintiff's A.

The Court: Well, somebody will have to straighten
251 me out on this. Amendment 11, now, to the Navajo
Tribe contract states as follows. This appears on
Page 100 of the Plaintiff's Exhibit A.

This agreement dated this 20th day of April, 1962, by and between Paul Jones, Chairman of the Navajo Tribal Council, acting for and on behalf of the Navajo Tribe of Indians, parties of the first part, hereinafter sometimes referred to

as the Tribe, and Norman M. Littell, Attorney at Law, Washington, D. C., together with Joseph F. McPherson, Assistant Counsel, and Walter F. Wolf, Jr., Spencer K. Johnson, and Robert J. Walton, Associate Attorney, of Window Rock, Arizona; and Leland Graham of Sacramento, California, but presently take up the physical abode in the Washington, D. C., area; the parties of the second part, hereinafter sometimes referred to collectively as attorneys.

Now, what had to be cleared up about that amendment, Mr. Denetsone?

The Witness: The matter of clarification was on Page 103 of this Section C under (3).

The Court: Section (3)?

The Witness: Yes, sir.

The Court: Read it, please.

252 The Witness: The second paragraph of Section 4(b) lists the separate claims cases which were known and set forth in separate pleadings when said contract of August 8, 1957 was signed by the parties thereto.

Said designation of claims cases is hereby amended and supplemented as follows:

By adding these claims which have since then been developed and set forth in separate pleadings or proceedings, namely, the following, Healing versus Jones before a three-judge Federal Court, Prescott, Arizona, No. 575 Prescott. Under the Navajo Tribe of Indians versus the State of Utah, where the Secretary of Interior, No. Utah 03009.

The Court: Now, have you finished?

The Witness: Yes, sir.

The Court: I take it the purpose and the meaning of the visit there with the people you have designated was to inform the Secretary of the Interior regarding alleged irregularities or improper conduct on the part of Mr. Littell, Mr. Denetsone?

The Witness: Yes, sir.

The Court: That you wanted this contract terminated; is that correct?

The Witness: That was stated in the resolution, yes.

253 The Court: The resolution had not been adopted when you talked to the Secretary?

The Witness: No, sir.

The Court: Who, if anyone, suggested you take this matter up with the Advisory Committee instead of the full Council of 74 members of that meeting, if that was suggested?

The Witness: It was discussed by the Chairman—it had to go to the Advisory Committee, anyway, first, to be recommended or to the Tribal Council or for the Advisory Committee to do what they thought best to do. It had to go to the Advisory Committee first in any event.

The Court: The Chairman said that?

The Witness: This is a matter of Tribal policy.

The Court: No, I meant at the meeting with the Secretary of Interior, did the Chairman make that recommendation or did someone else make it?

The Witness: I am a little bit confused now. I am not too sure whether we discussed it with the Secretary, whether we would take this before the Advisory Committee or not.

The Court: What was the reason for having the resolution adopted? You went to see the Secretary of the Interior. Was it necessary to go before the Advisory Committee now to get a resolution after you saw the Secretary of Interior and explained the problem to him?

254 The Witness: It could have been done with just a letter, a letter by the Chairman, or we had the alternative of having this a little stronger by action that the Advisory Committee and Mr. Nakai and I thought that we could take this to the Advisory Committee.

The Court: Was this suggested by you or Mr. Nakai at the meeting there with the Secretary?

The Witness: No, sir.

The Court: By anyone else?

The Witness: No, sir.

The Court: I will ask you not to discuss this matter with anyone during the luncheon recess.

Report back here at 1:45. We will now recess for lunch until 1:45.

(The Court recessed at 12:20 until 1:45.)

AFTER LUNCHEON RECESS:

Whereupon

Leo Denetsone,

having been recalled as a witness by the Defendant, and having been reminded he was still under oath, resumed the stand, was examined and testified further as follows.

Mr. Pittle: Had you concluded your questioning?

The Court: I have a couple questions.

Mr. Denetsone, during the meeting which you described this morning and before lunch, in the office of the
255 Secretary, when you were discussing this matter, did anyone suggest that you should first, you and the Chairman, rather, should first, in view of Paragraph 12, the termination clause, take this matter before the Tribal Council and let them look into this matter first, to determine whether there was any irregularity and whether there was any truth in these charges made against counsel of the Tribe?

Was that discussed at all?

The Witness: I believe, Your Honor, the Secretary mentioned that, but we felt and we stated that we didn't have legal help on our side to actually argue our case, present our side of the case, and the counsel to get a fair presentation in the Tribal Council. We mentioned that.

The Court: Now, this was before the resolution was adopted by the Advisory Committee, I take it, that all of this took place, before the announcement?

The Witness: Yes, sir.

The Court: Did anyone have a draft of this resolution that had been drafted subsequent to this meeting we have been talking about with the Secretary?

The Witness: No, sir.

The Court: When was that draft prepared and by whom?

The Witness: That was drafted by me shortly after, shortly before the meeting.

256 The Court: This was after your return from Washington?

The Witness: Yes, sir.

The Court: And you were assisted by someone, I think you mentioned someone assisted you?

The Witness: Mr. DeRose.

The Court: Now, these people who belonged to the Advisory Committee, if I understand the evidence correctly, were friendly toward the new Chairman?

The Witness: Yes, sir, Your Honor.

The Court: There were not any lawyers present?

The Witness: Not at that meeting, to my knowledge.

The Court: Nine members of the Advisory Committee?

The Witness: Yes, sir.

The Court: I think that is all I have.

Does anybody else have anything further?

Mr. Doyle: No, Your Honor.

Mr. Pittle: May this witness be excused, Your Honor?

The Court: Subject again to if you need him, if he is needed by either side.

(Whereupon the witness withdrew from the witness stand.)

Mr. Pittle: Would you call Mrs. Leo Denetsone?

257 Whereupon

Genevieve Denetsone.

having been called as a witness by the Defendant, and having been duly sworn, took the stand, was examined and testified as follows:

Direct Examination

By Mr. Pittle:

Q. Your name is Mrs. Leo Denetsone? A. Yes, sir.

Mr. Pittle: While we are waiting, may I state for the record, before the Defendant's case in chief is completed, we may wish to call Mr. Littell.

The Court: You may, under Rule 43(b) of the Civil Rules of Procedure.

Mr. Pittle: Yes, Your Honor.

The Court: You may.

By Mr. Pittle:

Q. And you live at Window Rock, Arizona? A. I do.

Q. You are a member of the Navajo Tribe? A. Yes, I am.

Q. You were not born a member of the Navajo Tribe?
A. I was born of a Navajo father and a Mohave mother, but I wasn't born of the Navajo Tribe.

Q. What position do you hold, Mrs. Denetson?
258 A. I am a legal secretary of the Navajo Tribe.

Q. And how long have you served in that position?
A. Since September of 1955.

Q. Would you state briefly your educational background?
A. I went to high school at the Ganado Mission High School, Ganado, Arizona. And I had one year of college at the College of Netawaka, at Netawaka, Kansas.

Q. You have served in your present position since 1955. Will you state briefly the duties of your position? A. I am stenographer to the attorney I am assigned to. I log in the mail every day. I usually am in charge of typing legal documents when they need to be typed, and I keep the docket for all our department and I do administrative duties, such as keeping the payrolls, purchasing, seeing that books are paid for as soon as they are received.

I take care of our library and see that it is kept current and I assist in keeping legal files and legal documents.

Q. During the course of your official duties, have you had occasion to become familiar with the vouchers and service records submitted by the attorneys in the Legal Department? A. Yes, I have.

Q. Will you state how you became familiar with that?
A. Well, I usually type them up at the end of the month for the attorney I am assigned to, and also keep the log
259 book in which the vouchers are logged out to the Chairman's office for approval, and when they are

returned to our office, they are sent to the Superintendent from our office for approval by the Bureau, and when they are returned from the Bureau, I see they are sent to our Accounting Department for payment, and see that the checks are mailed out to the attorney or given to the attorney at Window Rock.

Q. Who are some of the attorneys in the Legal Department for whom you have worked? A. I first worked for Lawrence Davis, and Lawrence Huerta, and Mr. Littell, when he came to Window Rock, I worked for him.

I worked for Leland Graham and I also worked for Joseph McPherson. And the last one was Walter Wolf.

Q. Are you familiar with the manner in which the attorneys have been paid after they submitted their vouchers? A. Yes, I am.

Q. Would you explain that briefly? A. Would you state your question again?

Q. The manner in which the attorneys have been paid. A. Well, when I first came to Window Rock, they were paid every two weeks like other Tribal employees, with the exception of Mr. Littell and Mr. Charles Alexander, who were located in Washington.

In 1961 they were required to submit a voucher to
260 the Bureau before payment and that was at the time that they were paid once a month on the approved voucher.

Q. Who approves their voucher for payment? A. Our Accounts Payable Section.

Q. Who was it drawn on? A. On the Navajo Tribe.

Q. Where is it payable? A. At Window Rock.

Q. At a bank? A. At the First National Bank of Window Rock.

Q. Now, you stated since about 1961 the attorneys received their pay by submitting vouchers and service records showing their duties? A. Yes.

Mr. Pittle: Will you mark this for identification, please, as Defendant's 4, the service records and some vouchers of

Joseph McPherson, which were Defendant's Exhibit 6, or identified at pre-trial?

The Deputy Clerk: Defendant's Exhibit 4 for identification.

(Defendant's Exhibit No. 4 was marked for identification.)

Mr. Pittle: And as Defendant's 5 for identification the service records and vouchers of Walter Wolf, which was Defendant's 7 at pre-trial.

261 The Deputy Clerk: Defendant's 5 for identification.

(Defendant's Exhibit No. 5 was marked for identification.)

Mr. Pittle: Defendant's 6 for identification, service records and vouchers of Lawrence Davis, which was Defendant's 8 at pre-trial.

The Deputy Clerk: Defendant's 6 for identification.

(Defendant's Exhibit No. 6 was marked for identification.)

Mr. Pittle: Defendant's Exhibit 7 for identification, the service records of Doherty, D-o-h-e-r-t-y, John J., which was Defendant's Exhibit 9 at pre-trial.

The Deputy Clerk: Defendant's 7 for identification.

(Defendant's Exhibit No. 7 was marked for identification.)

Mr. Pittle: And as Defendant's 8 for identification, the service records of Brannon, B-r-a-n-n-o-n, Richard R., which was the Defendant's Exhibit 10 at pre-trial.

The Deputy Clerk: Defendant's 8 for identification.

(Defendant's Exhibit No. 8 was marked for identification.)

By Mr. Pittle:

Q. Mrs. Denetsone, I show you Defendant's Exhibits Nos. 4 through 8 for identification, being the service records of various attorneys.

Have you had an opportunity to examine these before?

A. Yes, I have.

262 Q. Can you tell the Court first whether these are the service records and vouchers you described as having been prepared by the attorneys for payment of their services? A. Yes.

The Court: Let me ask you a question. Have these records ever been audited by any accountant or any auditor? Or has a resume been made of what was in there?

Mr. Pittle: I intend to put on the Chief Auditor of the Bureau of Indian Affairs and I will ask permission to put him on out of turn this afternoon, because he has a two weeks' scheduled conference, who will identify a tabulation which has been prepared for and is in digest form on all of these documents.

At this point I am identifying the original documents which, of course, I assume are the best evidence.

By Mr. Pittle:

Q. Will you look at the service records for Mr. Brannon, for example, on Tuesday, February the 21st, for the year 1961, and you will note——

Mr. Wiener: Will you identify the exhibit number, please?

Mr. Pittle: Defendant's 8 for identification.

By Mr. Pittle:

Q. Will you look at the service records for Brannon, for example, on Tuesday, February 21, for the year 1961,
263 and you will note the statement of his work on that day? A. Yes.

Q. You will note he said research re immunity of Tribe for sales tax, reviewed proposed legislation, State of Arizona, conferred with Mr. Doherty re definition of exclusive

interests in connection with Navajo-Hopi case, and so forth?
A. Yes.

Q. Now, you are familiar with all of these service records? A. Yes, I am.

Q. Will you explain the manner in which you became familiar with them, in addition to having typed them, or knowing this was the procedure for payment? If you can, answer that. A. A daily record was kept by each attorney usually and at the end of each month he dictated or wrote out in long hand for the secretary to transcribe, a daily resume of the services, and in the front of each service record we prepared a voucher to the place that indicates the amount due for the month that the services were performed, and a certificate of service which was sworn to before a notary public.

Q. Having worked in the Legal Department since 1955, did you become familiar with the nature of the cases on which the attorneys to whom you were assigned were
264 engaged? A. Yes, I did.

Q. Did you understand the clarification of the cases in your office as claims cases, as distinguished from General Counsel litigation? A. Yes. Well, in a legal docket our claims cases were kept separate from our General Counsel. Our General Counsel was divided into two categories, litigation before the Court and before the Administrator of Appeals.

Q. Have you prepared some of the service records and vouchers for some of the respective attorneys, Mrs. Denet-sone, and have examined the service records subsequently, did you note any incidents and do you remember any incidents where attorneys were engaged in claims work that were General Counsel attorneys?

Mr. Doyle: May I object to this. It calls for a conclusion of law for the witness.

The Court: Well, wouldn't the record speak for itself? If she can select an exhibit or part of an exhibit.

Mr. Pittle: Yes, Your Honor, I agree the records will speak for themselves and they are the best evidence. I am

just trying to illustrate the manner in which they should be.

Mr. Doyle: At this time may counsel come to the bench?

The Court: Yes.

265 At the bench in a low monotone:

Mr. Wiener: If Your Honor please, these documents and these questions are obviously a predicate for the admission of the service records. Now, in addition to our objection as to the questions of relevancy, which we are making simply for the record, in view of Your Honor's ruling there are additional and independent considerations for the extraction of all of these service records.

The first of these is that all of these service records were obtained by Mr. Zimmerman on his expedition to the reservation beginning on the 2nd of November 1963, as set forth in his affidavit, and in Mrs. Hesuse's affidavit, which are in evidence.

Now, the law is, and there is a Supreme Court case right on the nose, that when the Secretary makes a decision he cannot rely on after acquired knowledge to justify it.

I have a memorandum here and the case is Santa Fe Railroad against Fall, 259 U.S., and it is right on the nose. There are other administrative cases, law cases, to the effect that the only thing that can be considered in view of the administrative proceeding is the evidence that was before the administrative body at the time. That is basically one objection.

The Court: First of all, do you agree with the predicate?

266 Mr. Pittle: Not at all, Your Honor.

The Court: That these were taken by Mr. Zimmerman on November the 2nd?

Mr. Pittle: Not from the Plaintiff, Your Honor.

Mr. Wiener: They were taken.

Mr. Pittle: Not from the Plaintiff. They were subject to subpoena and the Bureau of Indian Affairs could have simply told the Secretary to send those records to Washington.

The Court: I think the point has been made. This was the information the Secretary didn't have when he acted.

Mr. Pittle: This is a separate point. But there is no review of an administrative proceeding here because this is what we are complaining about. We were trying to furnish administrative procedure which the Plaintiff says the Secretary says was not authorized and he was not allowed to invoke. And again, this misses the point completely. It charges then the Secretary with letters that were directed to the Plaintiff and he was requested to show cause why the administrative action should not be taken.

That was the administrative procedure which we say he was furnished with. It is adequate and proper and this is beside the point at this time.

I submit the only issue is whether or not the Plaintiff is entitled to equitable relief. This is for a permanent
267 injunction. He obtained his preliminary injunction on a motion supported by self-serving affidavits which we have revised as fully as we can, and are prepared to show they are largely erroneous.

Another important aspect or two, I submit the charges which were, and which the Plaintiff did not come in before him and show, and had he done so he would then have the administrative procedure that Mr. Wiener is talking about.

The Court: Let me ask you a question. I think I understand your point now.

Do you expect to show that these records were illegal or irregular?

Mr. Pittle: No, I expect to show that these records were perfectly proper and establish the charge that General Counsel used claims attorneys, whom his contracts specifically required him to use only on General Counsel work.

He then used attorneys who were being paid by the Tribe, but assisted him on claims work at the expense of the Tribe over and above the retainer he might have gotten for the claims.

The Court: Was this one of the allegations?

Mr. Pittle: This is one of the Plaintiff's, which he was required to respond to, but never did.

The Court: This is information acquired after November the 1st?

Mr. Pittle: These are factual. They are in support of the information which was initially submitted on which the Secretary tried to take action.

The Court: All right; are you finished?

Mr. Pittle: Yes.

Mr. Wiener: I have got another objection. One may be disposed of because of Your Honor's prior ruling. It is this. It is entirely inconsistent to say that Healing versus Jones was improperly labeled a claims case and charge the Plaintiff for impropriety, for using a General Counsel attorney on what the Secretary claims was a General Counsel case.

I have two other objections. The first one which I mentioned was the Secretary, not having had the documents before him, he cannot use those documents to justify the action that it took.

The second basic objection is that these documents were obtained by an illegal search and seizure when Mr. Zimmerman went into the Navajo Legal files and rummaged through there. And, Your Honor will remember Mr. McPherson's secretary said they took his own private papers.

Then, as to one exhibit, 11A—

Mr. Doyle: This isn't in yet.

Mr. Wiener: This was an illegal seizure. This was as bad as was the old case of Lefkowitz (285 U.S., 452), where they just went in there and rummaged.

Mr. Pittle: May I reply?

The Court: I will let you later.

Mr. Wiener: This was a taking and carrying away.

Mr. Pittle: I respectfully disagree. This was not an illegal search, and this was not a taking and carrying away of anything belonging to the plaintiff. It was a taking and carrying away of the Navajo Tribe. The Tribal Government as such belongs under the supervision of the Secretary of Interior. He could dissolve the whole thing and he could have directed all of those records might be shipped to Washington.

The Court: One thing we might do is to send this whole thing to the Auditor.

Mr. Pittle: If Your Honor will hear the testimony. I am not trying to establish Healing against Jones is or is not a claims case. It is only one of those and there are a number of others. The main point is this failure to disclose, the failure to explain, and I am laying the foundation now by this evidence which is the best evidence, after all, of what the attorneys did.

The Court: When did this witness examine these records?

Mr. Pittle: I was about to ask her the time she spent examining them.

270 Mr. Doyle: I think he might as well also brief us on what he proposes to do about the records of Joseph McPherson and Walter Wolf after July the 22nd, 1960, because their point is, if my memory serves me correctly, the evidence is that on November 19, 1959, Mr. Littell wrote to Mr. Paul Jones and the Advisory Committee and the Council, asking permission, in accordance with the contract, to use Mr. McPherson or Mr. Wolf on claims cases.

That also on January, I believe the 8th, the Advisory Committee agreed or passed a resolution allowing him to use them on claims cases and that thereafter, on July the 20th of that year, the Solicitor approved it.

Mr. Pittle: Your Honor—

The Court: Now, one at a time.

Mr. Doyle: The Solicitor having approved their use, so now I believe when the problem comes to dealing with the records there will be a grave difference.

Mr. Pittle: I don't believe so.

Mr. Doyle: There will be a grave difference between the use of the records certainly after the Solicitor has approved the use of these men for the purpose of claims cases or otherwise.

Now, furthermore, I think there is a grave distinction between someone charging over-reaching between the time the Council or the Advisory Committee approved the
271 use of them on January 8, 1960. So when you deal

with the record, you have a problem of those different dates and different men, and I don't think they should be put together.

Mr. Pittle: We readily admit that after July 1960, when the Solicitor approved McPherson and Wolf as claims attorneys, we make no contention about their work on claims. There is no argument there.

The Court: You have the objection in the record, Mr. Doyle and Mr. Wiener. You are protected on the record. I will admit them and receive them.

All right.

End of bench. Open Court:

Mr. Pittle: If I had a question pending to which an objection is made, I am prepared to withdraw the question.

The Court: All right. Proceed.

By Mr. Pittle:

Q. Are you familiar with the function of the Legal Department as a whole? A. Yes, sir.

Q. Can you tell us what its function was before Mr. Nakai's administration in April 1963? A. The Legal Department function before Mr. Nakai came into office, as I was familiar with it, was we handled all matters which were referred to us by the Chairman's office, which included anything to do with land right-of-ways to companies coming onto the reservation.

Q. Did you say trading? A. Trading. We issued memos for the Chairman which issued permission to various companies to prospect for oil and gas or other minerals.

We dealt with oil and gas matters, oil and gas refills, and one attorney was usually assigned to work with the realty office in the Bureau of Indian Affairs.

Q. How was incoming correspondence handled? A. Incoming correspondence was usually referred to us by the Chairman's office or letters that were addressed to the Chairman of the Tribal Council, or the Advisory Committee, were referred to us for further action.

Q. Do I understand this is all of the correspondence?
A. Practically all of the correspondence. I wouldn't say all of it.

Q. All right. Now, with the election of Mr. Nakai in 1963, in his taking office in April, did any changes occur in the function of the Legal Department in relation to the rest of the Tribal Government? A. Well, we didn't receive as much incoming mail as before. I believe it was referred to the other departments for action.

The attorneys seemed to be afraid to do anything without consulting with Mr. Littell.

273 Q. When you say they seemed to be afraid to do anything, can you explain what you mean? To do anything like what? A. Well, if any matter that came in was sort of touchy, they wouldn't take any action on it. They would let it pile up.

Mr. Doyle: May the witness keep a little farther away from the microphone? It is rather hard to hear her. Her voice is loud enough with it.

The Court: Yes.

By Mr. Pittle:

Q. Have you taken any action part in Tribal politics, Mrs. Denetone? A. No. Do you mean before the election?

Q. Before the election? A. No.

Q. Do you take an active part since his election? A. Yes.

Q. Tell us what you have been doing or have done. A. I have been working with my husband. We have been trying to go through the files to find out all we could about Mr. Littell's activities.

Q. Did you become familiar with Mr. Littell's contract amendment, resolutions relating to it as a result of this?

A. Yes, we did.

274 Q. You say you helped your husband go through these records? A. Yes.

Q. Can you tell us just what you did in helping him go through them? Did you examine them or read them? A. Well, I was very familiar with the way the Tribal files were

set up. I knew just where to look, and we went over them together whenever I had time—like sometimes during the day.

Q. Did you have occasion to become familiar with the provision in Mr. Littell's 1957 contract under Paragraph 4(a) page 40 of Plaintiff's A, which provided that there shall be no change in the compensation of Mr. Littell or Mr. Alexander during the first five years of that contract? A. Yes, sir.

Q. Did you have occasion to become familiar with Amendment 9 on Page 90 of Plaintiff's A, which authorized the increase in attorney's compensation to \$35,000 in August of 1961? A. Yes, I did.

Q. And did you become familiar with the resolution which authorized the execution of Amendment No. 9? A. Yes.

Q. Did you have occasion to search or examine the records and the matter of minutes of the Tribal Council or the
275 Advisory Committee approving the resolution to amend 9? A. Yes, we searched all of the records that we could find.

Q. About how long did you spend in your examination of these records? A. Well, we started going through them immediately after the inauguration and we studied them until about June.

Q. From when? I am sorry. A. Immediately after the inauguration, which would have been April 19th, the inauguration.

Q. Now, with respect to the 1957 contract, I call your attention to the provision on Page 41 of Plaintiff's A, which lists the cases denoted as claims cases.

Did you have occasion to become familiar with those? A. Yes.

Q. There were five of them, all claims before the Indian Tax Commissioner? A. Yes. I became familiar and with the Healing claim, but we could never find out what the other claims were about.

Q. Did you also become familiar with Amendment 11 to the attorney's contract in April of 1962, of which Paragraph

3(b) contained the provision that Healing versus Jones and one other case shall be considered a claims case? A. Yes.

Q. Did you also examine the resolution CF-17-62
276 on Page 108 of Plaintiff's A, which authorized the employment of Leland Graham and increased in compensation for Walton? A. Yes.

Q. Did you notice the absence of any authorization to have Mr. Jones to be inserted in Amendment 11 in the claims case? A. Yes.

Q. In your examination of the minutes of the meeting of the Tribal Council and the Advisory Committee, did you find any reference containing an explanation or disclosure to the full 74 members of the Tribal Council that amended No. 9, authorizing an increase of \$10,000 a year in the compensation of the General Counsel despite the prohibition in the 1957 contract that such an increase would not be obtained for five years?

Mr. Doyle: I object to the question. That is a conclusion.

The Court: Would the records be the best evidence?

Mr. Pittle: I am asking her from her examination of the records.

The Court: Well, are these records here?

Mr. Pittle: No, Your Honor, these are the minutes of the meetings of the Tribal Council, which are two drawers full.

Mr. Doyle: My objection, in addition to the point
277 I raised, the contract speaks for itself and what it concludes or doesn't conclude is a matter of law which Your Honor will draw from the contract itself and not from the characterization of Mr. Pittle.

The Court: Well, let's keep this case in proper prospective. As I see it, and if I am in error I wish you would enlighten me, but this Paragraph 12 of this contract sets forth what is known, I would say, as a termination clause.

Try to get right down to the question, to the nub of this case, the heart of it. It says, and I have read it before, it says:

Tribal Council may terminate this contract with good cause shown with respect to any modes for all of second party services as General Counsel after giving sixty days' notice to any of the second parties with respect to which termination is sought, and so forth.

There is no use repeating that. Now, this is what the contract says. This is what the contract says the way the contract may be terminated, given the requested required notice; and an opportunity, I suppose, for Mr. Littell to be heard on these charges.

The big question in this case is, did the Secretary exceed his authority by cancelling this contract and terminating it in the manner in which he did, regardless of all these records and things like that.

To me, I think this is the heart of the question. Now, you may be able to convince me otherwise, Mr. Pittle. You see?

Mr. Pittle: This is the first question and my testimony now is not directed to that.

It is directed to what I consider the second question. Assuming, as we discussed yesterday, that the Secretary tried to exceed his authority, and has no authority to terminate because of the provision to Section 12, the second question is, is Plaintiff entitled to this injunction?

The Court: Is he entitled to it because he didn't come in with clean hands?

Mr. Pittle: That is correct. And that is what I am trying to show.

The Court: I am not making any statement or intimating how I am going to rule until I have heard all of the evidence, and until I have briefs on this matter and proposed findings of fact.

Mr. Pittle: Well, Your Honor will appreciate the fact that you can't put everything in all at one time.

The Court: I am trying to keep in your mind what I think is one of the principal points of the case, and we will come to the other matters later.

279 Mr. Pittle: You will recall we had testimony by Mr. Denetsone that he was directed by Chairman

Nakai to examine minutes of the meetings of the Tribal Council and of the Advisory Committee.

And Mrs. Denetsone has just testified she assisted him. I am asking her whether in her investigation in the inspection of the minutes that she could locate, whether she did find any explanation or disclosure that Amendment No. 9, which increased the General Counsel's compensation \$10,000 a year, was explained to the members of the Tribal Council together with the fact that the original contract precluded any such increase for five years.

Mr. Doyle: You see, at that point we get into argument of law. The question is whether or not it did or whether or not it precluded it. The original contract had the provision and the other paragraph was the amendment to the original contract. Now, whether or not it amended—

Mr. Pittle: Your Honor, is it a question of—

The Court: Now, just a minute. One at a time.

Mr. Pittle: Is it the form of the question that he is objecting to?

Mr. Doyle: Yes, that is all of my objection. It is merely as to form.

The Court: Well, you can rephrase it.

Mr. Pittle: I will rephrase it.

280

By Mr. Pittle:

Q. You have just testified, Mrs. Denetsone, in your examination you noted Paragraph 4(a) of the 1957 contract provides there shall be no change in the compensation of Mr. Little or Mr. Alexander in the first five years of the contract.

This is on Page 40 of Plaintiff's Exhibit A. You mentioned that. And Amendment 9, which was adopted just four years later, you noted and testified this increased his compensation \$10,000 a year? A. Yes.

Q. I am asking you, during your examination of the minutes of the meetings of the Tribal Council, those that you found and examined, did you notice any explanation or disclosure to the Tribal Council that the original contract

had a provision that said there shall be no change in the General Counsel's compensation for five years? A. No, Mr. Littell was not at Window Rock at that time and we went through the minutes and we checked Mr. McPherson's statement which said—and we could not find where he had specifically told the Council that the original contract said that Mr. Littell would be paid \$25,000 for five years and his five years were not up yet.

Q. With respect to Amendment 11, which provided that Healing versus Jones and one other case shall be
281 considered a claims case, in your examination of the minutes of the meetings of the Tribal Council, did you find any explanation had been made to the Council that upon being put into the category of a claims case, the General Counsel would then receive an additional compensation based on the percentage of the recovery? A. No. We looked for this quite extensively. We wanted to find where Mr. Littell had told the Council that, because if this would be a claims case, he would receive ten percent of anything he recovered, the value of any land or one percent of the royalties. We could not find any statement to this effect.

This in my opinion was why we were so angry at Mr. Littell, because our people were never informed, or Council was never informed, that Mr. Littell would take ten percent that in effect would be his.

Q. Now, did you have occasion after Mr. Nakai became Chairman in April of 1963 to ask attorneys in the Legal Department to assist Chairman Nakai in any of his duties? A. Yes. I asked Walter Wolf, and he told me he could not because I knew what Mr. Littell could do to him.

Q. About when was that, can you tell us? A. I don't recall the exact date, but it was sometime in March, before the inauguration.

Mr. Doyle: I can't hear her.

282 The Court: I think if you will keep away from the microphone about six inches we may be able to hear you better.

Will you try it again now so everybody can hear? I understand it is difficult for her.

By Mr. Pittle:

Q. I asked, did you have an occasion after Mr. Nakai became Chairman, or after his election in March of 1963, to ask the attorneys in the Legal Department to assist the Chairman? A. Yes, I did. I went to Walter Wolf, and he told me he could not because I knew what Mr. Littell could do to him and he would help—

The Court: Now, just a minute. I can't hear too well, but if this is hearsay—

Mr. Doyle: It is unresponsive to the question, Your Honor, and it is purely hearsay and I move to strike it.

The Court: She was testifying to what somebody told her?

Mr. Pittle: Mr. Wolf—I think he has been identified as an attorney in the Legal Department under Mr. Littell. And I submit any statement from him is not any more against interest than anything Mr. Barry said.

The Court: I have to rule on objections as they are made. All right.

By Mr. Pittle:

283 Q. What did Mr. Wolf say to you? A. He said he could not because I knew what Mr. Littell could do to him, but he would help the Chairman in every way he could if it wouldn't involve any dispute between—if it wouldn't cause any dispute between him and Mr. Littell.

Q. Do you remember what kind of assistance you asked him to perform for you? A. I asked him to give me advice or to give advice to Mr. Nakai and Mr. Nakai's program.

Q. His program? A. His programs?

Q. And what programs, generally? A. Well, he wanted rapid economical development and he wanted public housing for our people, which we understood would be available for them, and which had been available to Indian tribes for two years, and Mr. Littell had done nothing about this for us.

Mr. Doyle: I move to strike the question. It was not responsive.

The Court: Overruled.

Mr. Pittle: Now, I wish to offer into evidence Defendant's Exhibits 4 through 8 for identification, which are—No. 4 is the service record for Mr. McPherson for the time shown in the service voucher.

The Court: These are Defendant's Exhibits 4
284 through 8?

Mr. Pittle: Yes. No. 5 for identification is the service record and voucher of Mr. Walter Wolf.

No. 6 for identification is the service record of Mr. Lawrence Davis.

No. 7 is the service record of Mr. Doherty.

No. 8 is the service record for Mr. Brannon.

Mr. Wiener: Mr. who?

Mr. Pittle: Brannon.

Mr. Doyle: The Court please, we object to the introduction of these on the grounds we stated at the bench.

The Court: Overruled. I will receive them.

Defendant's Exhibits Nos. 4
through 8 for identification
were received into evidence.)

Mr. Pittle: I have nothing further.

The Court: Mr. Doyle?

Cross Examination

By Mr. Doyle:

Q. Did your examination of these files that you have decided to answer to Mr. Pittle begin before the inauguration? A. I wasn't aware of them generally. I had typed most of them.

Q. Had you shown any of them to your husband
285 prior to the inauguration? A. Yes, I had.

Q. Did you take them away from the legal office and show them to your husband? A. I had compiled the

attorneys' contracts into one volume and I showed the volume to him.

Q. You had compiled the attorney's contracts into one volume? A. Yes.

Q. And you took the one volume from the legal files? A. Yes.

Q. And where did you take it, home? A. Yes.

Q. And you and your husband went over it at home? A. Yes.

Q. That was before the inauguration of Mr. Nakai? A. Yes.

Q. Did you ask permission of Mr. Littell? A. No.

Mr. Pittle: I object to the question. There is no foundation that Mr. Littell had to give anybody permission.

By Mr. Doyle.

Q. Who was in charge of your legal office? A. At what time?

Mr. Pittle: The Chairman was in charge of the legal office.

286

By Mr. Doyle:

Q. At the time immediately prior to the inauguration of Chairman Nakai. A. Walter Wolf.

Q. What position did Mr. Wolf have? Who was in charge of the whole Legal Department? A. Mr. Wolf.

Q. Did you ask permission of Mr. Littell to take the contract home? A. No, I didn't.

Q. Did you ask permission of Mr. Wolf? A. No.

Q. Did you ask permission of any other attorney? A. No, I did not.

Q. Who was Chairman then? A. Mr. Paul Jones.

Q. Who? A. Mr. Paul Jones.

Q. Did you ask Mr. Paul Jones? A. No.

Q. Who, if anyone, asked you to bring that contract you had compiled home? A. No one asked me. I took it home myself.

Q. Did your husband ask you? A. No.

287 Q. Did you talk to Mr. DeRose at this time? A.
No, I didn't know Mr. DeRose before the inaugura-
tion.

Mr. Doyle: Will Your Honor bear with me a minute,
please?

No further questions, Your Honor.

Mr. Pittle: If the Court please, I have one further ques-
tion which goes beyond the scope of the cross, if I may be
permitted?

The Court: Well, let us find out.

Mr. Doyle: I have no objection to it.

Redirect Examination

By Mr. Pittle:

Q. You mentioned, Mrs. Denetsone, you did become active
in political affairs after Mr. Nakai became Chairman? A.
Yes.

Q. Approximately how soon after he became Chairman?
A. Immediately after.

Q. Immediately after. Were you familiar with the fact
that Mr. Nakai came to Washington and consulted with the
Secretary of Interior about the attorney's contract? A. I
only know what my husband told me.

Q. You only know it because your husband told you? A.
Yes.

Q. Are you personally familiar with any events
288 leading to the adoption by the Advisory Committee
of a resolution June 25, 1963? A. Yes.

Q. Requesting the Secretary to investigate or terminate
the attorney's contract? A. Yes.

Q. How did you become familiar with that resolution?
A. I helped my husband list the charges that we wanted to
bring against Mr. Littell.

The Court: A little louder, please.

By Mr. Pittle:

Q. Do you know whether it was considered that the
charges should be taken to the Tribal Council? A. Yes, it
was.

Q. How do you know? A. There were many meetings held, many evenings with Mr. Nakai and his following, and this question was often debated.

Q. Did Mr. Nakai's following consist of some members of the Advisory Committee? A. Yes.

Q. Council members? A. Yes. Well, that is what it was, Council members and Councilmen.

Q. And do you know of your own knowledge why it
289 was not presented to the Tribal Council? A. Well, I have my opinion, my own.

The Court: From your own knowledge, not your opinion. Just what you know.

The Witness: Yes.

By Mr. Pittle:

Q. What do you know of the facts? A. I know that it was debated back and forth many times. Some wanted to bring it to the Council and others didn't want to because Mr. Littell, when he gets before the Council, he can—well, he just sways them, and he talks and he talks and he talks, and pretty soon the issue at hand is lost.

Mr. Doyle: That is pure speculation by this witness, Your Honor, and I move it be stricken.

The Court: It is hearsay, probably, in one respect. However, I will let her testify.

The Witness. This is what was said at the meetings.

The Court: At these meetings?

The Witness: Yes, sir.

Mr. Pittle: I have no further questions, Your Honor.

Recross Examination

By Mr. Doyle:

290 Q. When was the first one held? A. I don't know.

They were held two or three times a week.

Q. Beginning what week? A. After the inauguration.

Q. Before or after? A. After the inauguration.

Q. The inauguration was on April the 15th, was it not?
A. 13th.

Q. All right. Now, the week following April 13th, there were two or three meetings, were there? A. Well, not every week. Some weeks there were.

Q. On that first week, was there? A. I believe so. I believe every night.

Q. Was this at a meeting of the Advisory Committee? A. No.

Q. This was a meeting of the followers of Mr. Nakai? A. Yes.

Q. All right. Now, where were the meetings held? A. They were held at various places; sometimes at the Chairman's house and sometimes at the Vice Chairman's house.

Those were the only ones I attended, those which were held at either the Chairman's or Vice Chairman's house.

Q. This is in Window Rock, Arizona? A. Yes.

291 Q. Who was present? A. Well, usually the Chairman, and the Vice Chairman.

The Court: I can't hear you.

The Witness: The Chairman and Vice Chairman, my husband and myself, Mr. Frank Luther and Mr. John Brown, Mr. Carl Todachene, Mrs. Mable Hesuse and Mr. Wilson Halona. I don't know—

The Court: Now you're dropping your voice again.

The Witness: I don't know There was always a large group and usually some were there. They weren't always present. They were there at one or other of the meetings.

By Mr. Doyle:

Q. Were minutes taken at these meetings A. No.

Q. Were any members of the legal staff present? A. These weren't official meetings.

Q. Was Mr. Barry DeRose present at any of them when you were present? A. Not until mid-summer, I don't believe. Not until June. At that time we requested his help and needed it desperately.

Q. You did what? A. We requested his help and needed it desperately.

Q. By we, whom do you mean? A. My husband, myself, the Vice Chairman, Mr. Luther, Mr. Jones and others.

292 Q. Mr. Nakai? A. Yes.

Q. And Mr. Nakai requested his help about that time, too? A. I don't know if he personally requested it, but he was there at the meetings when we asked for help.

Q. Where did you first contact Mr. DeRose to ask for help? A. At Window Rock, I believe. Well, I never knew him until he came to Window Rock to assist in presenting a Public Housing program at this time, and we told him what we thought was wrong with Mr. Littell's contract, and asked his opinion on it.

Q. And when was that? A. I don't remember when he first came to Window Rock. It was sometime when he was presenting the housing program.

Q. And was that after the inauguration? A. Yes.

Q. Before June 25? A. Yes.

Q. All right. Now, at the conference where you asked his help and opinion, what did he say? A. Well, he helped us.

Q. Did you make any arrangements to retain him, fees concerning this work? A. Well, the Advisory
293 Committee passed a resolution employing him as a consultant, but the contract was never carried out.

Q. What were you going to pay him? A. Well, as far as his helping us with legal advice, he was never paid anything.

Q. Was there any understanding at all concerning his future employment for the Navajo Tribe? A. No. This was never.

Q. His employment as General Counsel? A. No.

Mr. Doyle: No further questions.

Mr. Pittle: I haven't anything further.

The Court: All right, we will take our afternoon recess.

(The Court recessed at 2:45 and reconvened at 3:00.)

AFTER MID-AFTERNOON RECESS:

The court: All right.

Mr. Pittle: Mrs. Denetsone has been excused, has she, Your Honor?

The Court: Yes.

294 Mr. Pittle: Mr. Boyd, please.

Whereupon,

Milton C. Boyd.

having been called as a witness for the Defendant, and having been duly sworn, took the stand, was examined and testified as follows:

Direct Examination

By Mr. Pittle:

Q. Your name is Milton C. Boyd? A. Yes, sir.

Q. Where do you live? A. 1522 Dillston Road, Silver Spring, Maryland.

Q. And where are you employed? A. I am employed at the Bureau of Indian Affairs, Department of Interior.

Q. What is your position? A. I am Chief Auditor for the Bureau.

Q. How long have you occupied that position? A. Ten years this February.

Q. Will you state briefly the duties of your position, Mr. Boyd? A. I am responsible for formulating and developing the program, its policies and procedures.

It involves the irrigation accounting, power accounting, actual cost accounting and budget accounting.

295 Q. How long have you served in the Government altogether? A. Twenty-three years in May.

Q. Now, in your present position, do you have any people under your supervision? A. Yes, there are 17.

Q. In what capacity, generally? A. Fourteen of them are auditors and three of them are clerks.

Q. Is Mr. McFarland under your supervision? A. Yes, he is.

Q. What is his position? A. He is classified as an auditor.

Q. I show you Defendant's Exhibit 8, Mr. Boyd, which are records, service records and vouchers of respective attorneys, which have been identified.

Will you take a look at these and tell me if you have examined these before? A. Yes, those are the records that I examined.

Q. And when did you first examine these records? A. We were directed to the job between November 6th and November 19th, 1963. It was the last several days that we examined these records.

Q. Will you tell us under the circumstances which
296 you were assigned to examine these records A. Well, I was assigned to the Solicitor's Office in the Department of Interior and asked to review these records of the attorneys, looking for, particularly, with reference to the claims cases.

Q. Did anyone assist you in your examination? A. Mr. Eugene McFarland.

Q. Whom you just mentioned? A. Yes.

Mr. Pittle: Will you mark for identification, please, Defendant's 9, being an index or tabulation of the service records of Joseph McPherson from 1958 through 1963?

The Deputy Clerk: Defendant's 9 for identification.

(Defendant's Exhibit No. 9 was marked for identification.)

Mr. Pittle: Defendant's 10 for identification, being the service tabulation or index of the service records of Walter Wolf, Jr., from 1958 to 1962.

The Deputy Clerk: Defendant's 10 for identification.

Defendant's Exhibit No. 10 was marked for identification.)

Mr. Pittle: These are all in order.

Defendant's 11 for identification, being the tabulation

and index of service records of Lawrence Davis from 1957 to 1959.

The Deputy Clerk: Defendant's 11 for identification.

(Defendant's Exhibit No. 11 was marked for identification.)

297 Mr. Pittle: Defendant's 12 for identification, being a tabulation or index of the service records of John J. Doherty from 1951 to 1961.

The Deputy Clerk: Defendant's 12 for identification.

Defendant's Exhibit No. 12 was marked for identification.)

Mr. Pittle: Defendant's 13 for identification, being a tabulation or service record of Richard R. Brannan for 1960 and '61.

The Deputy Clerk: Defendant's 13 for identification.

(Defendant's Exhibit No. 13 was marked for identification.)

By Mr. Pittle:

Q. Mr. Boyd, I show you Defendant's Exhibit Nos. 9 through 13 for identification and ask you if you will examine them and tell me whether you are familiar with these documents. A. Yes, I am familiar with them.

Q. Did you prepare them? A. They were prepared by Mr. McFarland, but from our notes.

Q. When you say your notes, do you mean your joint notes? A. Yes, we worked together.

Q. Can you tell us generally what they purport to show?

A. Well, they show any mistake of the service record
298 of the claims cases, and whenever—as we searched through the records, if we found a mistake on one of the records, we would fold the sheets. These are the summations of the sheets we folded.

Q. Do I understand you put an X mark on the appropriate day of the month on which the attorney and his service record noted he had been engaged in or what had been a claims case? A. Yes.

Mr. Doyle: May I ask whether or not you intend to offer them at this time, Mr. Pittle?

Mr. Pittle: Yes.

Mr. Doyle: May I have a few questions on the voir dire, Your Honor?

The Court: Yes.

Cross Examination

By Mr. Doyle:

Q. I notice on these exhibits, marked for identification 9, 11, 12, 13 and 10, here you have a category Utah 03009, School Section Case.

I ask you whether or not, when you examined the files to determine the listings under Utah 03009, you limited yourself precisely to work on that particular case alone and not to anything concerning the other Utah School Section cases or sections? A. We extracted whatever was referred to as the School Section; as to whether or not it pertained to more than one, I don't know.

Q. So, when you went through all of the files, you extracted out the material there that you got under Utah 03009, the only reference you looked for when you went through it was a Utah School Section matter? A. That is correct.

Q. Would your tabulation be any different if I advised you that there are some 15 schools, Utah School Sections, in which there are problems involved, some of which are General Counsel and some of which are not? A. Not in accordance with my instructions.

Q. Not within the province of your instructions? A. No.

Q. Oh, I see. So, as I see it, in making this tabulation under 03009 you just put in any time you saw a reference of a Utah School Section? A. That is correct.

Q. Now,— A. Some may have numbers and some may not have had numbers on it? A. Yes, sir.

Q. Do you know when the Department took the position

on Utah 030009, that the State of Utah was entitled to
 300 a patent on the case? A. I am not familiar with the
 case as such.

Q. Do you know when the Department of Interior took a
 position contrary to the Tribal position of the Navajo
 people concerning Utah 030009? A. I am not familiar with
 the case.

Q. So you made no distinction of any time intervals
 involved in the case at all? A. It was only those records
 that we examined between August of '57 and October of
 '63.

Q. You made no distinction between one time in the early
 part or mid-January of 1959, and the time prior and the
 time subsequent thereto? A. The distinction was my date
 on the service records.

Q. And by date on the service records you just mean
 '57 on up to? A. No, I think it was weekly and from '57
 on up.

Q. From '57 to when? A. Through October of '63 or
 through October of '63.

Q. Now, what were your instructions concerning the
 Utah School Section cases as to what was and what was not
 a claims case, regarding the Utah School Section problem?
 A. We were only asked, or I was only asked to pull out
 when there was reference to any of those five cases.

Q. So, anything you saw a reference to a Utah
 301 School Section—

Mr. Pittle: May I have the record show that the
 witness was referring to those five cases, he was referring
 to the five cases tabulated on Defendant's exhibits for
 identification?

The Court: Do you mean that, Mr. Witness?

The Witness: Yes, sir.

By Mr. Doyle:

Q. You are referring to the five cases, you are referring
 to your own tabulations? A. That is correct.

Q. But as I understand it, and I just want to get this
 clear, in putting in your checks, your check marks, and

making your computation under the heading that you have here, Utah 030009, School Section Cases, you simply put down and marked anytime that you saw a reference to the Utah, to work on the Utah School Section problem, whether or not it had Utah 030009 on top of it? A. That would be correct; and I am also sure that number did not always appear on the service record of the attorneys. They were referred to generally and frequently.

Q. Now, concerning the attorneys McPherson and Wolf, did you make any distinction between work performed by those two gentlemen prior to July of 1960 and subsequent to July of 1960? A. There was no distinction made, no.

Examining the total records from the dates that I gave.

Q. Completely from the dates, would you say whether or not it was before or after that date it made no difference to you? A. I think that would be for the attorneys to look over.

Q. Would I be correct in saying also you made no distinction prior to June 8, 1960 and subsequent to June 8, 1960, regarding those two men? A. I don't know the exact dates. I would have to look here to see, but we took whatever the dates on here that are the correct dates.

We made no distinction other than those. It is all inclusive within the dates.

Q. Who wrote your instructions which you were to follow? A. There were no written instructions, they were verbal.

Q. Who gave you the verbal instructions? A. The attorney, Mr. Zimmerman.

Q. Mr. Zimmerman? A. Yes.

Q. And did Mr. Zimmerman tell you what to do? A. Search the records, looking for references for these cases, and to pull out those five cases and give them to him for his analysis.

Q. For his analyses? A. Yes.

Q. And thereafter did he confer with you concerning what his analyses showed? A. No.

Mr. Doyle: Your Honor, I will wait until counsel offers them into evidence and then make the objection.

Mr. Pittle: I will offer into evidence Defendant's 9, 10, 11, 12, and 13 for identification with the witness's testimony in explanation of what they are and what they purport to show.

Mr. Doyle: Your Honor please, I object to these. I think this on its face is an inaccurate compilation because counsel has not shown the burden of proof of showing, nor has the witness stated what is or what is not a claims case by definition, and hence, these compilations mean nothing and are of no assistance to the Court.

Mr. Pittle: May I respond to that, Your Honor, please?

The Court: Yes.

Mr. Pittle: The question of it being a claims case and the question of when Healing and Jones and the School Section became a claims case ultimately will be for de-
304 termination only as to an issue that has to be decided.

This tabulation purports to show what kind of cases these attorneys worked on for the period in question.

Now, with respect to the School Section case, if there is any confusion there, I am willing to have the documents admitted without regards to any of the Utah School Section cases.

The Court: Is that agreeable?

Mr. Doyle: No, sir; for the simple reason in the Utah School Section problem, there are two sections which came before the Secretary of Interior which became a claims case and it became a claims case, the matter as I understand it, on the State of Utah and the first time it became a claims case was when the Department of Interior took a position contrary to the claim of title of the Navajo Tribe to those sections.

There are a number of the other sections involved. Before that occurred, there was no problem of their becoming claims cases.

Also, I understand from looking at these records a great number of the matters involved in there concern general

consultation concerning the problem of the school line sections generally and hence a mere compilation of when they were there will give you no help on whether or not you are looking at a claims matter or a General Counsel case.

305 The Court: Well, what probative value do you think they have?

Mr. Pittle: I don't believe they have any probative value beyond the testimony of the witness.

I am offering them for the convenience and in consideration of what the attorney did.

As I said earlier, the service record is the best evidence because they are prepared by the attorneys under Mr. Littell's supervision. But it becomes a major problem to ask anyone to read several thousands of pages of documents. You see at a glance here, and if you have to check against the service records, you can pull it out of the batch just with ease, and that is the tabulation and the purpose of the offering.

The Court: All right, they will be received. The objection is overruled.

Mr. Pittle: I have no other questions of Mr. Boyd.

The Deputy Clerk: Defendant's Exhibits 9 through 13 received in evidence.

(Defendant's Exhibits Nos. 9 through 13 for identification were received into evidence.)

Mr. Doyle: No further questions, Your Honor.

The Court: You are excused.

(Whereupon the witness withdrew from the witness stand.)

306 Mr. Pittle: Mr. Carl Todacheene.

Whereupon

Carl Todacheene.

having been called as a witness by the Defendant, and having been duly sworn, took the stand, was examined and testified as follows:

Direct Examination

By Mr. Pittle:

Q. Your full name is Mr. Carl Todacheene? A. Yes, sir.

Q. Will you spell that, please, for the reporter, Mr. Todacheene? A. Carl, C-a-r-l, and the last name is T-o-d-a-c-h-e-e-n-e.

The Court: Spell that again, will you?

The Witness: T-o-d-a-c-h-e-e-n-e.

By Mr. Pittle:

Q. And you live at Ship Rock, New Mexico? A. Yes, sir.

Q. And you are a member of the Navajo Tribe? A. Yes, sir.

Q. You are also a member of the Navajo Tribal Council? A. Yes, I represent the biggest segment of the Navajo population.

Q. About how many? A. I represent approximately 5,000 persons.

Q. Are these all voters or is that the population of your district? A. That is the population, sir.

Q. About how many of those are voters, if you know, approximately? A. Approximately at least 2,000.

Q. When did you become a member of the Navajo Tribal Council, Mr. Todacheene? A. I was elected in March of 1963, and I was sworn in in April of 1963.

Q. Did you take part in Tribal affairs of the Navajo Tribe before becoming a member of the Council? A. Yes, I was pretty active in the civil affairs of the Navajo Tribe.

I started about 1959 and I was elected as personnel member of the School District. It starts off at the reservation and extends to the Navajo reservation and also participated in the various civil affairs of the Navajo people in the Ship Rock area.

Q. And what did you do before you were elected a member of the Council? A. Well, starting about 1950 I started working for the Bureau of Indian Affairs which terminated approximately up to about 1958.

308 Q. And—? A. And from 1958 I started working for the Navajo Tribe in their oil and gas department until I was—really 1960, and then I switched to the Navajo Tribal Utility Authority until the time I was elected.

Q. What position did you occupy in the Bureau of Indian Affairs? A. I was with their so-called, I was with their Relocation Program.

Q. Relocation of people? A. This involved taking care of Navajo people who were moving off of the reservation for employment, and it used to be we used to handle the Indians, of Indians—all types of work like agricultural or industrial work.

And then when the field offices were set up like in Chicago, Cincinnati, and St. Louis.

Q. Field offices of the Bureau of Indian Affairs? A. Yes, I used to assist in that type of work on the reservation.

Q. What kind of work did you do in the Tribal Government when you first went to work for them? A. I was employed as more or less a liaison-type work for the oil and gas activities, handling the field operations of the Tribal oil and gas exploitations, taking care of damages, because some of the residential areas in the reservation were damaged, and saw that the drilling companies took care of their operations, like with their utility floats and having knowledge of the leases on the Navajo reservation.

That is for major drilling of cryptogram work.

309 Q. Would you state briefly your educational background? A. I don't have a degree, sir, but I have about a year at the University of New Mexico, and I have about two years in the Mexico School of Mines at Socorro, New Mexico.

Q. What was your major study? A. My major at Socorro was Coal Engineering and Mining Geology.

Q. All right, now, in the campaign of 1963, when you were elected to the Navajo Tribal Council, did you support Raymond Nakai who was running for the Chairmanship? A. Yes, sir, I did.

Q. Did you campaign for him actively? A. I campaigned a few times with him.

Q. Can you tell us who were the other candidates for Chairman in that campaign? A. The incumbent, Mr. Paul Jones, and one other candidate, Mr. Sam Billison, besides Mr. Nakai.

Q. Can you tell me the general platforms, what
310 general platforms did Mr. Billison and Mr. Nakai campaign on? A. One of them, I think they were campaigning on was the fact of uplifting the economy of the Navajo reservation in terms of employment and industry.

Another one was that something should be done to stop the encroachment of the Legal Department on the Navajo Tribe, because of the fact that they were more or less making the decisions of the leadership at the time.

Q. Excuse me—continue. A. And also the fact that the agreement or what was stipulated by Mr. Nakai was to reorient the cooperation that existed between the surrounding communities, surrounding states, and the Bureau of Indian Affairs, because it was felt through the encroachment of the Legal Department that some of these things, the good relationships, were grievously handicapped.

Q. Was it explained how the relationships you referred to had been endangered, or whatever it was?

Can you give us the details?

Mr. Doyle: I object to this. This is completely irrelevant and hearsay.

The Court: I am wondering if this isn't cumulative. Haven't we had this testimony on the so-called issue?

Mr. Pittle: This is corroborative. If it is worth any further explanation, if not, all right.

311 There is one other point that the witness is now mentioning which I don't believe, if he may be permitted to cover, in the campaign of '63, as a campaign issue.

The Court: Go ahead.

By Mr. Pittle:

Q. You say it was believed that Mr. Billison and Nakai's campaign, among other things, for reorientation among the

surrounding states and communities with the Navajo people? A. Yes, I think so.

Q. What happened that would require reorientation in their statements and in their campaign platform?

Mr. Doyle: I object to that. If he wishes to testify on what the issues were or what they were talking about, but why is another problem.

By Mr. Pittle:

Q. What were the issues—what was the issue with respect to this encroachment of the Legal Department and the relief or reorientation that you mentioned? A. Well, just like I said, the feeling was that the good cooperation, the good name of the Navajo Tribe was more or less frowned upon because we were just like I said, the leadership was identified with the Legal Department, to look at our leadership and administration, so to speak, and they had broken the cooperative spirit with the surrounding communities and states because of their arrogant attitude, the arrogant attitude the Tribe took.

Q. What arrogant attitude with respect to what, if you can tell me? A. The good relationship of the surrounding communities and the states and the Bureau of Indian Affairs and the Government facilities. That is what Mr. Nakai said we would reinstitute—good relationships.

Q. All right. Now, have you served on the Advisory Committee of the Tribal Council? A. Yes, sir.

Q. When were you first selected for the Advisory Committee? A. Well, after we were sworn in, I would say about May 1963, until the Advisory Committee—nine members, it used to have nine members first.

Q. You were selected by the Chairman? A. We were selected by the Chairman and then around this fall, in November or October, the 18-member Advisory Committee came about.

Q. Are you still on the Advisory Committee? A. Yes, sir.

Q. You have been elected a member and you presently serve on it? A. Yes, in the second go-around, the Council

authorized themselves to be selected at Advisory
313 Committee, so that is how I was selected as one.

Q. Have you had occasion to become familiar with Mr. Littell's attorney contract and amendments involved in this litigation, Mr. Todacheene? A. Yes. Just like I stated, I think it was a campaign issue by the Chairman.

Through that means he explained the familiar, not too familiar work, but familiar enough to know it was pointed out by Mr. Nakai that there was discrepancy in the attorney's contract.

Q. Are you finished? A. Yes, sir.

Q. I show you Defendant's Exhibit 1, which is a copy of the resolution of June 25, 1963, by the Advisory Committee, requesting the Secretary of Interior to investigate, order, and terminate Mr. Littell's contract.

Will you look at that and tell me if you are familiar with the resolution? A. Yes, in substance.

Q. Were you first selected for the Advisory Committee in May of 1963? A. I beg your pardon, sir?

Q. You were first selected as a member of the Advisory Committee about May, 1963, did you say? A. Yes.

314 Q. You were on the Advisory Committee when this resolution was adopted by it? A. Yes, sir.

Q. Did you attend the meetings at which it was adopted? A. I am pretty sure I did.

Q. Do you recall the discussions leading to its adoption? A. Yes. I think the way it struck us was that something had to be done, and so, therefore, I voted for this resolution, sir.

Mr. Pittle: May I have a minute or two, please, Your Honor?

The Court: Yes.

By Mr. Pittle:

Q. Mr. Todacheene, do you know anything about the employment of Mr. Bennett and associates as mining and geological consultants for the Navajo Tribe? Any connection? A. At the time I was employed I got to know about Mr. Tashu Bennett.

He was already appointed at the time I started working for the Navajo Tribe, sir.

Q. Are you asking me, sir? A. I said he was already employed at the time I started work there.

Q. Did the oil production from the anti-intrusion
315 become an issue in the campaign of 1963?

Mr. Doyle: I object, Your Honor, please. I believe this issue or whatever it may be, has not appeared in any of the pleadings or at the pre-trial, or anywhere else.

The Court: Why is this material?

Mr. Pittle: Well, I have the three main charges that we are trying to support. This witness is prepared to testify about those, but I tender him for cross examination on them, but anything I put in on it I believe will become cumulative.

This is one other item which is not one of the serious charges but shows there is disagreement in the Tribal Council, the Advisory Committee, and the General Counsel.

The Court: Was this one of the charges on file against Mr. Littell?

Mr. Pittle: Not by the Advisory, no, sir.

The Court: Well, if it is not an issue, I do not see the materiality of it.

Mr. Pittle: Then, with that, I will tender the witness for cross examination and offer to prove by corroborating testimony the three charges that the preceding witnesses have testified to.

The Court: All right, you may examine.

Cross Examination

By Mr. Doyle:

316 Q. Mr. Todacheene, at Mr. Pittle's request you examined this Defendant's 1, and you said, I believe, you were present when the matter was discussed at the Advisory Committee meetings prior to its adoption? A. Well, I was present at the time it was adopted, yes, sir.

Q. What sort of proof was put on to you concerning these rather serious charges? A. Well, it is just like I stated,

there was a point through the Chairman of the Navajo Tribe that there existed discrepancy in the Tribal attorney's contract.

Of course, we were shown a copy of the contract and the resolution, the so-called Amendment 11, and it was on that basis that I, for one, voted for it.

Q. Then was the matter explained to you by the Chairman? A. Yes, sir.

Q. That was Chairman Nakai? A. Yes, sir.

Q. And was it explained by Mr. DeRose? A. So far as I know Mr. DeRose wasn't around.

Q. How about a Carl Todacheene? Did he come in and explain the matter to the Advisory Committee?

The Court: This is Mr. Todacheene who is on the stand.

Mr. Doyle: Oh, pardon me. I think that objection
317 should be readily sustained.

By Mr. Doyle:

Q. Mr. Denetsone, did he come in and explain the matter to you? A. He may have and he may not. I don't recall correctly, sir.

Q. Were the reporters there when the matter was explained to you? A. We always make a record, a record of anything so important. I am pretty sure they were present.

Q. At the time these matters were discussed there? A. Yes.

Q. Was this suggested by anyone, that Mr. Littell be called before the Advisory Committee to explain these matters? A. Well, the thing was we were so split up, sir, over Mr. Littell. The whole Tribe was split and the feeling was high, so I think that that would have split the Tribe, of course, and the whole Tribe, so consequently, why should we be more or less inviting ourselves, I mean to be asking for trouble, so we never called Mr. Littell.

Q. Did anyone at the Advisory Committee meeting suggest that the matter should be placed before the Tribal Council? A. Well, this Advisory Committee had always acted as the Executive Committee of the Navajo Tribal Council.

And I think, and we discussed, the feeling was,
 318 since it was such a highly controversial thing, that it
 should go to the Secretary directly, because we al-
 ways say the White Father was Washington. Therefore, I
 would assume he could straighten it out quicker than we
 could ourselves, because this was a campaign issue and we
 were split down the middle.

Q. Did you suggest the Chairman should go to Washing-
 ton? A. No, sir, I don't recall.

Q. Who suggested that the Chairman should go to Wash-
 ington? A. I presume the Chairman himself.

Q. Did you go to Washington with him? A. Yes, on one
 trip.

Q. When was that trip? A. Well, now, it was right after
 election. I think it was about either May or June of 1963, sir.

Q. Who went with you? A. At the time I went, Chairman
 Nakai, myself and Leo Denetsone.

Q. Did Mr. DeRose go with you? A. No, sir.

Q. And whom did you see? A. Well, we, I think, we went
 to see Dick Schifter, if I recall correctly, and Dick Schifter
 took us to the P.H.A. Office. I don't recall the gentleman's
 name there. It was a Barry somebody—he was the
 319 Acting Director, and so Mrs. McGuire wasn't there,
 and so, at that time we discussed the P.H.A. Housing
 for the Navajo Tribal Council.

We also paid a visit to the Bureau of Indian Affairs and
 we talked about industrial development, economic develop-
 ment with Mr. Nash and Mr. Frye.

Q. Did you talk about the attorney contract with them?
 A. I think we did. And then we also visited the Secretary of
 Interior, and I'm pretty sure we discussed the matter with
 the Secretary.

Q. And who did the speaking for you at the Office of the
 Secretary? A. Well, the Chairman. I may have contributed
 something also.

Q. What did you say to the Secretary and what did he
 say to you? A. I don't recall exactly what we said, but I
 think the feeling was, of course, surrounding Mr. Littell.

Since we were split, the Navajo Tribal Council, we thought that maybe we should have the assistance of the Great White Father, Mr. Udall, to take care of some of our problems, that he can put us to peace.

Q. And what did he say that he would do? A. I don't recall, sir, but—

Q. When you made the trip, you hadn't passed that resolution, had you? I am referring now to Defendant's 1.
320 If you made the trip on the 19th, it was prior to the time of your adoption of this resolution on the 25th, wasn't it? A. I think we made the trip about—like I said, about May or June. I don't have the specific dates.

Q. Did anybody suggest that you go back and adopt the resolution of the Advisory Committee? A. Not that I recall, sir.

Q. Did you see Mr. Frank Barry? A. Not Barry DeRose.

Q. No, the Solicitor of the Department, Mr. Frank Barry?
A. I don't recall.

Mr. Doyle: No further questions, Your Honor.

Mr. Pittle: I have nothing further, Your Honor.

The Court: All right.

Mr. Pittle: May he be excused, Your Honor?

The Court: Yes. You are excused.

(Whereupon the witness withdrew from the witness stand.)

The Court: Who is your next witness?

Mr. Pittle: Yes, we do have another witness, and he might be a little bit long, if you want to start him now.

The Court: Well, I don't know. I think probably we might as well adjourn now until ten o'clock tomorrow morning.

(The Court adjourned at 3:50 p.m., until 10:00 a.m. the following morning.)

• • • • •

361 Washington, D. C.

Wednesday, February 3, 1965.

• • • • •

PROCEEDINGS

The Court: Are you ready to proceed?

Mr. Pittle: Yes, Your Honor, and we would like to recall Mrs. Denetsone briefly to identify something.

Thereupon

Genevieve Denetsone

was recalled as a witness and, having been previously duly sworn, was examined and testified further as follows:

Direct Examination (resumed)

By Mr. McKevitt:

Q. You have been sworn before, Mrs. Denetsone? A. Yes.

Q. And you testified previously that you worked in the office of the Legal General Counsel part at Window Rock?

A. Yes.

Q. And that you are familiar with the files at that office?

A. Yes, sir, I am.

Mr. McKevitt: Will you mark this please?

(The document was marked Defendant's Exhibit No. 14 for identification.)

Mr. McKevitt: For the record, No. 14 for identification is Defendant's Pretrial Exhibit 12-EB.

Now, will you mark this?

(The document was marked Defendant's Exhibit
363 No. 15 for identification.)

Mr. McKevitt: Defendant's 15 for identification is Defendant's Pretrial Exhibit 14-EB.

Now, will you mark this?

(The document was marked Defendant's Exhibit No. 16 for identification.)

Mr. McKevitt: Defendant's Exhibit 16 for identification is Defendant's Pretrial Exhibit 11-B.

Will you mark this?

(The document was marked Defendant's Exhibit No. 17 for identification.)

Mr. McKevitt: Defendant's No. 17 for identification is Defendant's 11-A at pretrial.

By Mr. McKevitt:

Q. I hand you Defendant's Exhibit 14 for identification and ask you if you can identify the material in that? A. All this is material which was taken from the files, the legal files of the Navajo Tribe.

Q. What does it relate to generally? A. Well, this particular file relates to lifting claims restrictions on Mr. Wolf and Mr. McPherson.

Q. I will hand you Defendant's 15 for identification and ask you what this is, Mrs. Denetsone? A. This file contains material on the five years restriction on Mr. Littell's 364 salary, and information on his raise.

Q. I will hand you Defendant's Exhibit 16 for identification and ask you what that is? A. This file is mostly made up of work which was done by attorneys on the Healing vs. Jones and the Utah School Section case.

Q. Any particular attorneys? A. Well, this is services of John J. Doherty in the Navajo-Hopi case, and Laurence Davis, also on the Hopi case.

Q. Can you pick out any particular document there illustrative of the group, Mrs. Denetsone? A. There is a memorandum here from John Doherty to Joseph McPherson dated February the 13, 1961, on the Navajo-Hopi case.

And also here is another memorandum from John Doherty to Edward Plummer, dated November 30th, 1960, which discusses work done for the period on Healing vs. Jones.

Q. Do you have any there on a Court of Claims case? A. I think I have one. Then there is a letter from Laurence Davis dated September the 8th, 1960, to Joseph McPherson enclosing a motion for his withdrawing as counsel in the case.

Q. Who was Laurence Davis? A. He was an attorney.

Q. One of the attorneys working at Window Rock?

365 A. Well, at this time he was working part time at Phoenix, but he previously worked at Window Rock.

Q. Where was Mr. McPherson? A. He was at Window Rock.

Q. He was one of the attorneys? A. Yes, he was also on the contract.

Q. I will hand you Defendant's Exhibit 17 for identification and ask you what that is? A. This file also contains material of work done by attorneys on the Healing vs. Jones case, and the School Section case, and the Helium case.

Q. When you refer to the Helium case, where was that case? A. The Helium case was a Court of Claims case.

Q. In what court was that? A. The United States Court of Claims; I am not certain of that.

Q. Can you pick out any of these documents illustrative of the rest of them? A. Well, there is a letter here from Norman Littell's secretary, Mrs. Murial Starr, to Walter Wolf, dated March 10th, 1960, where she was forwarding proposed findings of fact and that Mr. Littell would communicate with Mr. Wolf about it later.

Q. The proposed findings of fact in what case? A. 366 The Helium case.

Q. Which is a Court of Claims case? A. Yes.

Mr. McKevitt: Your Honor, we offer Defendant's Exhibits 14, 15, 16 and 17.

Mr. Wiener: If the Court please, the plaintiff objects on the grounds already stated, namely, that this material was not before the Secretary when he acted, and in respect of Defendant's Exhibit for identification No. 17, there is involved a very serious breach of the attorney-client privilege, on which we would like to approach the bench.

The Court: All right.

(Thereupon, counsel approached the bench and the following occurred:)

The Court: What is No. 17?

Mr. Wiener: I have it. This is the last exhibit.

May I state the objection? Here are letters between Mr. Littell, Mr. McPherson and Mr. Davis, a memorandum of a conference between them. They also consider strategy and prosecution of the legal interests of the Navajos in connection with the School Land Sections case problem.

One part of the School Lands problems is now still under litigation before the defendant Secretary of the Interior, in his Case No. 030009.

Now, disclosure of these papers represents a
367 breach of the attorney-client relationship without the consent of the client, namely, the Tribe, and it is the more indefensible because the seizure of these internal strategy papers was accomplished by the Secretary before whom one of the cases is now pending.

Mr. McKevitt: These are papers that are in the office of the Tribe in Window Rock. The attorney works for the Tribe under the direction in the contract.

No. 3 says the said attorneys shall perform the duties required of them under the direction and upon the request of the Navajo Tribal Council. They are not private attorneys. They are employees of the Navajo Tribe.

And the executive officer of the Tribe is the Chairman, and the Chairman, when this problem came up, Mr. Zimmerman represented the Secretary, and the Chairman simply took these files. These are Navajo files.

The Court: Are these some of the files Mr. Zimmerman took?

Mr. Wiener: These are part of the files he took.

Mr. McKevitt has not read the second sentence of that paragraph 3. The Chairman of the Navajo Tribal Council, which is his official title under the Code, had no power under the Code to waive the attorney-client privilege, and the most
368 shocking thing is that here is the client, the Navajo Tribe, and the Secretary sends his emissary into the files and grabs papers in a case which is pending before him, and in a matter that he is supposed to act on impartially as an administrative officer.

The Court: Well, I am not going to read all this material.

Mr. McKevitt: On that last point, Your Honor, one of the charges made is that these general attorneys were hired as General Counsel attorneys, and they are supposed to work for the Tribe and do general attorney work for the Tribe. At the same time Mr. Littell has a dual contract, for claims work, and for the claims work he was supposed to hire individual people, and all expenses for claims work comes out of his pocket because the attorney contract provides if he is successful in claims work, he can claim 10 per cent for himself, and we assert he used these people and the Tribe was paying for work they were doing under his claims contract, and in effect taking money out of the Tribe's pocket by using these people.

That is one of the charges in this case and this is material that proves that, that people were working improperly on claims work when they should have been doing tribal work.

The Court: Well, is this Court to be called upon to determine whether the work was being done in connection with claims cases or the work was under the contract of General

Counsel? Do I have to decide that? Do I have to go
369 through these hundreds of exhibits?

Mr. McKevitt: No, but we say that there is proof that at certain times these individuals were clearly not authorized to do any claims work, and the contract says they shall not do any claims work.

The Court: You may run into the situation where one person may say this is claims work and another say this is not.

You are getting into an interpretation of the kind of work done.

If I am going to have to go through all these papers, we will never get through with this case. I don't think I should have to do it.

Mr. Wiener: In the memorandum by Mr. Barry here, at the bottom of page 16, he says if the attorneys have been improperly used they can be subject to an offset when we are asking for a fee.

But that is not the objection. The objection, may I say is this: The shocking breach of the attorney-client privilege.

The Court: Who is the particular client?

Mr. Wiener: The Tribal Council.

The Court: What right does the Chairman of the Tribal Council have? Does he have any right to release these records?

Mr. Wiener: None whatever.

370 The Court: Without the authority of the Council?

Can you show me any authority?

Mr. McKevitt: The defendant simply says that the General Counsel works under the direction of the Chairman.

The Court: This is part of the contract?

Mr. McKevitt: Yes, sir.

The Court: Paragraph 3 says: Said attorneys shall perform the duties required of them under the contract on the request and at the direction of the Chairman of the Navajo Tribal Council, subject to such instructions as he may receive from time to time the Advisory Committee of the Tribal Council.

I suppose that means subject to such instructions as the Chairman may receive.

The General Counsel shall report to the Tribal Council at any regular or special meeting on any matters pertaining to the legal affairs of the Tribe when in his opinion or that of the Chairman, the Advisory Committee, or the Tribal Council the best interests of the Tribe so require.

Didn't I say something about that in the opinion I gave in the contempt proceeding?

Mr. Wiener: Yes.

But we say, Your Honor, it is true this was done by Mr. Nakai's permission to Mr. Zimmerman. We say Mr. Nakai

371 is Chairman of the Tribe but as such he had no authority to permit the Secretary of the Interior, before whom a case of the Navajo Tribe was pending, to see the interoffice memorandum and correspondence of the Tribe's attorney, involving particularly litigation strategy

and I say I cannot conceive of a more outrageous breach of the attorney-client privilege.

Mr. Pittle: May I suggest another reason why it is proper? The Navajo Tribe was an unorganized Tribe, and the tribal property is held in trust by the United States of America. The United States owns legal title to every piece of property owned by the Navajo Nation, except individual allotments in another part of the reservation. But this is property of the United States. It is true the Navajo Tribe has equitable title, but these records are records of property or real estate that is the property of the United States, and we are taking our own records.

Mr. Wiener: Then the guardian is violating the ward's attorney-client privilege.

The Court: Well, I cannot get the significance of these papers by looking at them quickly. I certainly cannot tell whether they are important to the issues or not.

Mr. Wiener: They have nothing to do with the issues.

The Court: Does this go to the issue of clean hands?

Mr. McKevitt: Yes, Your Honor.

The Court: This is what the Court of Appeals said on page 5 of the slip opinion.

372 I will read a little bit ahead to get the idea.

It states: The contract provided for General Counsel's services but it also provided for claims services in investigating, formulating and prosecuting claims of the said Indians against the United States, specifically designating the appellee as claims attorney for the Tribe. Certain separate and distinct claims against the United States were listed as then pending before the Indian Claims Commission.

Then Footnote 5 says this: Undoubtedly relevant ultimately to a decision on the merits as to what services came within which of the two categories, we need not at this point do more than note that the parties understood a definite distinction to exist between General Counsel services and claims services.

That is their statement, it is not the same.

Mr. McKevitt: But we have to prove that.

The Court: Then it goes on to say: Approved in behalf of the Secretary pursuant to Secretarial Order No. 2508, as amended, 17 Federal Register 1570, pursuant to Section 2103 of the Revised Statutes of the United States, 25 U.S.C. 81, the contract pertinently contained a termination clause which reads as follows:

And there is incorporated the paragraph, Paragraph 12, Termination:

The Tribal Council may terminate this contract for
 373 good cause shown in respect to any one or all of second parties' services as General Counsel after giving sixty days' notice to any of second parties in respect to which termination is sought, the said termination to become effective upon approval of the Commissioner of Indian Affairs, provided however, that in the event of disagreement between the parties as to the sufficiency of the cause, the question shall be submitted to the Secretary of the Interior. In such event, the parties of the second part or any one of them so terminated, shall receive compensation, and so forth.

Now, this picks up on page 7, and the opinion goes on:

The Secretary can point to not statute applicable here which confers upon him any such authority. In October, 1963, the Department's Solicitor by memorandum to the Secretary had advised him that the Navajo Tribal Code, Title 2, Section 1173 (c) provides:

No person shall be engaged to render services which are subject to the requirements of Section 2103 of the Revised Statutes of the United States, 25 U.S.C. 81, without the prior individual approval of the Navajo Tribal Council.

The Solicitor then commented:

Thus it is clear that authority to act effectively for the Navajo Tribe with respect to the employment of an attorney under 25 U.S.C. 81 is lodged in the Navajo Tribal
 374 Council. The Advisory Committee of the Tribal Council has no authority to speak effectively for the Tribe in such matters.

This is the Solicitor's recommendation to the Secretary in October, 1963, and that he acted after that apparently.

Mr. Pittle: With respect to termination.

The Court: He didn't follow this recommendation apparently, but he felt he had authority.

What I am trying to do is to keep this case on an even keel without getting into these collateral matters.

At this point, if I get into what are supposed to be claims services and what are General Counsel services, we will be here until Christmas.

Mr. McKevitt: We will not, because this is one of the basic three charges, that certain attorneys hired for general work worked as on claims cases. The claims cases are listed here in Amendment 11.

We will show in certain areas that General Counsel attorneys were assigned to work on claims cases, and this is something that is basic to the case we make in the assertion of clean hands, and this is part of our proof.

We put part of the proof in yesterday when we showed the vouchers paid, and this falls in the same category relating to the same general proposition.

Mr. Wiener: There is no issue raised on the pleadings for compensation for claims work. In his October memorandum 375 the Solicitor said, If these General Counsel attorneys have been improperly used on claims work, Mr. Littell may owe a set-off for this. Now, the set-off is not in issue because Mr. Littell is not showing these vouchers under claims work, nor has he put in any vouchers.

Now, on the question of whether using attorneys on claims work, General Counsel attorneys on claims work gives rise to clean hands, our objection to this part is not based on that general proposition, nor is it based on their having acquired knowledge on that basis, but that it is a violation of the attorney-client privilege.

The Court: Let me tell you something. You are going to have this proposition come up. Isn't this before me on the motion to quash the subpoena?

I am going to require you to bring every record in the case that is in that subpoena, and we are going to have an open trial, do you understand?

Mr. Wiener: Yes.

Mr. McKevitt: Yes.

The Court: You can tell the Secretary he is going to have to bring every record asked for in that subpoena, and we will find what the truth of the situation is.

Mr. McKevitt: That is the only thing we want, the truth.

The Court: You are claiming privilege in the Secretary's subpoena that was issued, and I want all the
376 information in this Court in this trial, and I am not getting technical but I might just as well decide it right now.

Mr. McKevitt: It is all right with us.

The Court: I want him to bring everything, every piece of evidence that relates to this case from the Department of the Interior, and I will consider it.

Mr. Pittle: That is agreeable to us.

The Court: You may be technically right that it is a privilege communication, but the truth has got to come out of the situation somehow.

Mr. McKevitt: That is our evidence we are bringing.

The Court: You might tell the Secretary of the Interior to bring all this information called for in the subpoena.

Mr. McKevitt: We have it here already.

Mr. Doyle: May I take up another matter? In the exhibit number, which was originally numbered 12, which is now Exhibit 14, many papers were photostats of that exhibit, which you kindly furnished to us prior to the trial, after the pretrial. They were photostated and included in the memorandum from the Department of Interior, but somewhere at the Department of Interior they were giving advice and suggestion how the case should go forward, and you would not want that included in the exhibit, it would not be relevant.

Mr. Pittle: That will be in connection with your
377 subpoena.

The Court: In connection with your objection, I

think I was right when I granted the request of the Government to have the case heard on the merits, because this thing now indicates to me what the Court of Appeals probably had in mind when it stated at page 5: Undoubtedly relevant ultimately to a decision on the merits as to what services came within which of the two categories, we need not at this point do more than note that the parties understood a definite distinction to exist between General Counsel services and claims services.

Now, I will hear the evidence, and will admit them, and this is one of those cases that there is a jigsaw puzzle, and it has to be fitted together, and the only way to fit it together is to find out what the evidence is.

All right, let us proceed, we are going to have all the records and evidence on both sides.

(Thereupon, counsel resumed their places in the courtroom and the following occurred:)

(The documents previously marked for identification as Defendant's Exhibits 14 through 17 were received in evidence.)

Mr. McKevitt: You are excused.

The Court: Counsel, will you give me a copy of the subpoena duces tecum we talked about?

As I told you I will expect all these records called 378 for in the subpoena to be available.

Mr. Wiener: This is a copy of it, Your Honor.

Mr. McKevitt: We have responded to the subpoena. They are here. I made the motion as a basis for my argument about it, but they are here.

The Court: All right, let us proceed.

Mr. Doyle: I have some questions, Your Honor.

Cross Examination

By Mr. Doyle:

Q. Mrs. Denetsone, you have identified certain exhibits here this morning for Mr. McKevitt.

Did you remove any of them or did you take any copies of them home before the inauguration of Chairman Nakai?
A. No, I don't have any at home.

Q. Did you ever take any of them from the office and bring them home? A. I don't believe so. I would have to go through them individually, I don't know.

Q. Was it your practice to bring any of the documents from the legal office to your home? A. At times, yes, sir.

Q. And would the times be both before and after the inauguration of Chairman Nakai? A. Yes.

Q. And would you show them to your husband?
379 A. I would show them to my husband.

Q. To who? A. I would show them to my husband.

Q. And would you show them to anyone else? A. No.

Q. Mr. Laurence Davis after he left the Tribal Council staff? A. No. Mr. Davis requested help in the minutes, and he looked to the Advisory Committee, but this was after the inauguration.

Q. When did he make this request? A. I don't remember. It seems like it was somewhere maybe last summer.

Q. Last summer? A. I don't remember the exact date.

Q. Well, approximately during last summer? A. After the inauguration.

Q. What did he request? A. He requested certain minutes which had been denied him.

Q. Which had been denied him? A. Yes.

Q. And did you obtain these from the files? A. We went to the Advisory Committee, and a resolution was passed.

380 Q. And by "we" who do you mean? A. The Chairman and my husband.

Q. Was Mr. DeRose in this at all? A. No, he wasn't.

Q. Did you show to Mr. DeRose any of the documents which you took from the legal office and brought home? A. We went to Mr. DeRose, or he came to Window Rock, and he was an attorney, and we went to him, and we told him about that we felt that Mr. Littell and those under him had

influenced the Tribe in that they had us fighting every one.

He had us fighting the Bureau of Indian Affairs. He has us fighting the States of Arizona and New Mexico and Utah, and he had us fighting business, and they had us fighting labor unions, and they had us fighting oil and gas companies.

The had us fighting the Hopi and the Ute Tribes, and we just didn't feel that we would ever progress in this matter.

In addition to that, we felt that Mr. Littell had not been fair to the Navajo Tribe and to the Navajo people in his contract, and didn't feel that the majority of the Council ever even knew what the contract was, and what the amendments meant, because Mr. Littell had never gone to the Council and used plain, simple English.

Most of these people understand only just a little English, and you can explain something to them and they
381 don't understand it. You have to be very explicit, and Mr. Littell never did that. He rose to talk with them.

And we showed him the documents, we showed him the attorney contract, and we said: Do you think we are right or he is wrong?

And he said: It is simple outrageous, what we showed him.

And we were not able to pay him any fee. We don't earn very much, but he was willing to help us, and we needed all the help we could get, and we wanted anyone that would listen to us.

Q. Now, when did that conference take place? A. It must have been in May; I am not certain of the date.

Q. In May? A. May or June.

Q. Did you ever talk to him before the inauguration? A. No, I never met Mr. DeRose before then.

Q. Who suggested that you go to Mr. DeRose? A. Well, Mr. Bugge, one of the administrative analysts, who worked for the Chairman.

Q. He suggested Mr. DeRose, Mr. Bugge? A. Yes, he did.

Q. When did you approach Mr. Bugge? A. I didn't approach him.

382 Q. Who did? A. My husband.

Q. Approximately when did the conference with Mr. Bugge take place? A. I don't remember. It was in March after the election.

Q. Prior to the inauguration did you talk to any attorney at all? A. I don't remember.

Q. You don't remember? A. No, I don't believe we did, but I can't say for sure.

Q. During this time did you talk to Mr. Wurtzel at all about this matter? A. I never knew Mr. Wurtzel. I didn't know him before he came to Window Rock.

Q. After he came to Window Rock did you talk to him about it? A. As I stated before, we would talk to any one that would listen.

Q. Well, was Mr. Wurtzel included in the any one? A. Yes, we talked to him.

Q. And where did that conversation take place? And where? A. Well, at the office, when we were eating lunch, we talked to him at various times.

Q. What did you say to him and what did he say
383 to you? A. Well, we told him the same story we told Mr. DeRose, and I don't remember exactly what he said.

Q. What did he say in substance? A. I can't remember exactly. We talked to so many people about it, to tell you the truth.

Q. And did they suggest that you do anything? A. Not to me personally.

Q. To any one else that you know of? A. I don't know what you mean.

Q. You said they made no suggestion to you personally. Do you know of any suggestion that Mr. Wurtzel made to anybody else? A. I don't recall.

Q. What about the general suggestion? A. I can't remember.

Q. How about Mr. Schifter? Did you talk to Mr. Schifter about this matter? A. Yes.

Q. And when and where did the conference with Mr. Schifter take place? A. I just don't remember. I only met him on a few occasions.

Q. Was it after April 15th, or after April 13th, after the inauguration? A. Yes.

384 Q. What did you say to Mr. Schifter in substance, and what did he say to you in substance? A. Well, I can't remember the conversation, but I remember telling him we would never progress under this man Littell.

The Court: A little louder, please.

The Witness: I told him that we would never progress under Mr. Littell.

By Mr. Doyle:

Q. Well, what did he say? A. I can't remember the conversation. He came mostly on housing, and we discussed this, and I probably talked to him about the attorney contract, but I can't remember just what it was.

Q. I know you can't remember exactly what he said to you, but can you give us the substance of any remarks Mr. Schifter made at this point? A. I am sorry, I can't.

Mr. McKevitt: He is covering the same ground as the last time she was on, Your Honor.

Mr. Doyle: Well, I just have one more question, as a matter of fact.

By Mr. Doyle:

Q. Did Mr. DeRose say anything to you concerning going to the Secretary of the Interior? A. As I recall, Mr.
385 DeRose advised us to go to the Tribal Council.

The Court: I didn't hear that. What did you say?

The Witness: As I recall, Mr. DeRose advised us to go to the Tribal Council.

The Court: Advised you to go to the Tribal Council?

The Witness: Yes, sir.

By Mr. Doyle:

Q. Did anybody advise you to go to the Secretary? A. No, I think—I don't recall anyone telling us to go to the Secretary.

He was always our guardian and we didn't feel, because none of us were lawyers, we were any match for Mr. Littell in the Council, and the Secretary was our guardian, and we felt he had plenty of legal advise available to him, and we felt that he should make an investigation.

Q. Before June 25th, did you discuss this matter with any members of the Bureau of Indian Affairs at Window Rock? A. Well, I didn't personally discuss it with them, no.

Q. Do you know of anyone discussing the matter of Mr. Littell with any members of the Bureau of Indian Affairs?

A. I don't know that I know any. I don't know of any specific.

Q. You would recall if you had discussed it with any members of the Bureau of Indian Affairs? A. If I had, I would.

Q. And if your husband had?

Mr. McKevitt: I think this is repetitive, Your Honor.

Mr. Doyle: All right, that is all.

By The Court:

Q. Let me ask you one or two questions.

How many people live in Window Rock, Arizona? This is the headquarters, isn't it? A. Yes, it is the headquarters. We don't have—I don't know the exact number.

Q. Approximately? A. Well, it is about 400 people, but we have about maybe a thousand in other places, too.

Q. This is where the Tribal Council has executive offices or offices there? A. Yes.

Q. That is the headquarters? A. That is considered the headquarters.

Q. Now, this gentleman, Mr. DeRose's name has been mentioned in this trial. A. Yes.

Q. Where does he live or where does he have his office with respect to Window Rock? A. He lives at Globe, Arizona, about a four hours' drive, I would say.

387 Q. Four hours' drive, about 150 miles or 200 miles, something like that? A. About 150; I don't know.

Q. Now, does he have a practice around Window Rock, Arizona, to your knowledge in connection with matters involving the Indians or the tribes? Have you ever heard of him in that area? A. Well, he told us he was serving on a task force, but I didn't know him then.

Q. He told you what? A. He told us he was serving on a task force but I didn't know him then.

Q. What is a task force? A. It was a task force of the Bureau of Indian Affairs, I believe, which included all the Indian reservations in the United States.

Q. Well, what I would like to find out if I can, is how did he get into the picture? Who got him to represent you people? Who suggested that you hire him? Has that been answered?

Mr. McKevitt: Mr. DeRose is going to be the next witness, Your Honor.

The Court: I understand, but I would like to ask her too.

The Witness: We heard of Mr. Vern Bugge, who
388 we were told had done tremendous things to improve the Salt Water River Project down in Phoenix, and we contacted him, and the Chairman wanted to get the organization of the Tribe analyzed, and what could be done to improve it, and we told Mr. Bugge that we didn't feel we would ever progress under Mr. Littell, and we didn't feel that Mr. Littell would cooperate with the Chairman's program, and we wanted to get started right away, right after the inauguration, in some program that will be beneficial to the Navajo Tribe.

And so he had—I don't know this—but he suggested this Federal Public Housing Program, and he said that he knew Mr. Schifter.

By The Court:

Q. And who said he knew Mr. Schifter? A. Well, this is what he told my husband.

Q. You say, "he"? Who is "he"? A. Mr. Bugge.

Q. Mr. Bugge? A. Yes, and it had been done at the Sioux's, and also the White River Apaches were working on this.

So he contacted Mr. Schifter for us.

Q. Where is Mr. Schifter's office? Is that in Washington? A. In Washington. We had never heard of him.

Q. You had never heard of him before? A. No, I
389 didn't know him, and I might add that Mr. Bugge was a John Bircher.

He was in Phoenix, and when he was driving up to Window rock, he stopped.

Q. What I am trying to find out about is Mr. DeRose. A. Well, Mr. DeRose came to help us.

Q. He came. A. To Window Rock.

Q. Now, this was after the inauguration? A. Yes, it was either in May or June, I don't remember.

Q. Do you know if Mr. DeRose took any part in this political campaign on behalf of Mr. Nakai or anything like that? A. I am certain he didn't. He didn't help him at all.

Q. Are there any lawyers at all in Window Rock, who practice there? A. Just those that work for Mr. Littell.

Q. Are there any private attorneys, who have a general practice there? A. No.

Q. There are 400 people there, you say? A. Yes.

Q. And you don't have any lawyers at all in Window Rock? A. Well, it is a governmental agency, and it is a small town, and we are trying to get a shopping center.

The Court: All right. Call your next witness.

390 Mr. McKevitt: I have one more question, Your Honor.

Redirect Examination

By Mr. McKevitt:

Q. Mrs. Denetsone, you said the reason you wanted a housing development—would that help the Navajo people?

A. Yes, it would help us. Our people live in little wood shacks, and we need housing desperately.

Q. And to give employment, too? A. Yes, to people in building these houses, and with self-help, and it would help the people.

Q. One more question. Did there come a time in November when some of the files in the legal office were removed by Mr. Littell or on his behalf, do you know? A. Well, records of the minutes of the Tribal Council were taken by the old guard. We don't know what happened to them.

Q. You don't know who took them? A. Yes, the former Tribal Court Reporter took them and they tried to get them back, but they say they gave them to Annie Wauneka and Maurice McCabe.

Q. They took them where? A. We don't know where they took them. All we know is that they were gone one day, and they weren't there any more.

Q. Have you asked Annie Wauneka or Maurice McCabe to return them? A. I don't know. My husband may
391 have, or the Chairman may have; I don't know.

Q. So these files are now missing from the official Tribal files there? A. Yes.

Mr. McKevitt: That is all, Your Honor.

The Court: All right, is there anything further? You may step down.

(The Witness was excused.)

Mr. Pittle: Call Mr. Robert Young, please.

Thereupon

Robert Young

was called as a witness by the defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Pittle:

Q. Your name is Robert Young? A. Yes, sir.

Q. And you live at Gallup, New Mexico? A. Yes, sir.

Q. What is your occupation, Mr. Young? A. I am the Area Tribal Operations Officer, Gallup Area Office, Bureau of Indian Affairs.

Q. Now, you testified in this particular litigation
392 in another phase before, have you not? A. Yes, sir,
I have.

Q. Well, just to go over it briefly to refresh your recollection, you served in that position since February, 1962?
A. Yes, sir.

Q. Will you state briefly the duties of your position? A. The duties of my position are to review tribal ordinances and other enactments of governing bodies for 24 tribal groups within the Gallup area.

I also am in charge of the responsibility for reviewing tribal budgets, and budgetary amendments, and I have the responsibility of assisting tribal groups in the development of constitutions and charters, and the amendments and revisions of these organic documents, and to help the tribal governments in developing more effective administrative organization.

Q. Will you state briefly your educational background?
A. My educational background is largely in the field of anthropology.

Q. Did you do any college work? A. Yes, sir, at the University of Illinois and subsequently at the Graduate School of the University of New Mexico.

Q. Did you receive a degree? A. Yes, sir.

Q. What was it? A. It is the Degree of A.B. from the University of Illinois.

393 Q. And you say you did graduate work? A. Yes.

Q. And how long did you spend on graduate work?
A. About a year and a half, as I recall.

Q. Did you apply for any graduate degrees? A. I intended to at the time, but the war came along and it changed my plans.

Q. Now, you tell us that you have been in the Gallup Office since 1962, and prior to that you were stationed at Window Rock, Arizona, as I recall? A. Yes, sir.

Q. What did you do from the time that you were stationed at Window Rock? A. I was Assistant to the General Superintendent at Window Rock from roughly 1955 until 1962, and previous to that time I was Assistant to the Area Director, at the time Window Rock was an Area office, and in that capacity I served from about 1950 until 1955.

Q. So that you were at Window Rock all together from about 1950 to 1962? A. Actually, I was there longer than that, because previously I was employed as an Education Specialist in Indian languages, and during the preceding decade from 1940 to 1950, much of my duty was at Window Rock or on the Navajo Reservation.

Q. Do you speak Navajo? A. Somewhat, yes, sir.

394 Q. And other Indian languages? A. I have knowledge of other Indian languages.

Q. Now, by virtue of your official duties, have you become familiar with Tribal government affairs of the Navajo Tribe? A. Yes, sir, I have.

Q. This was during the time you were stationed at Window Rock? A. Yes, sir.

Q. Window Rock is just a place in the Navajo Reservation; is that correct? A. Yes, sir, it is the headquarters of the Navajo Tribe and the Navajo Agency.

Q. Have you attended Council meetings of the Navajo Tribe? A. I attended almost all the meetings of the Tribal

Council during the decade 1950 until 1962, at the time I went to the Gallup Area office.

Q. Did you attend any Tribal Council meetings after 1962? A. Very few, sir.

Q. We have had described for us the form of Tribal government. You were not permitted to hear the testimony.

Up to now we have heard it consists of 74 Council members elected by popular vote, and up until October, 1963, an Advisory Committee of nine members selected by the Tribal Chairman.

Is there any pertinent information that should be added to that with relation to the form of the Tribal government?

A. Only to state that the Navajo Tribal government is not based on a constitution, a Tribal constitution.

The Navajo Tribe rejected the Indian Reorganization Act, known also as the Act of June 18, 1934, and as a result the Tribal government, since its origin, has been based on regulations promulgated by the Secretary of the Interior.

Q. Is that the only significance of the fact, that the Tribe has not been organized under the Indian Reorganization Act? A. Yes, had they been organized under the Indian Reorganization Act the probabilities are that they would have adopted a Tribal constitution pursuant to the provisions of Section 16 of the Act, and they would then have been recognized as a duly authorized governing body of the Tribe empowered among other things to employ legal counsel for the Tribe.

Mr. Wiener: I think this is entirely speculative, Your Honor. I object. It is not responsive.

The Court: Read the last question and answer.

(The last question and answer were read by the reporter.)

396 The Court: He is trying to tell what somebody might have done under certain circumstances.

Mr. Pittle: I thought he was talking about what could have been done under the Act. I move to strike that.

The Court: Isn't this all a matter of record, what he is talking about?

Mr. Pittle: Not entirely, but I am willing to strike that last question and answer.

The Court: All right.

By Mr. Pittle:

Q. Are you familiar with the authority of the Navajo Advisory Committee as it existed up until October of last year?

Mr. Wiener: I think that calls for a conclusion of law. We have the Code.

The Court: Isn't that in the Tribal Code?

Mr. Wiener: It is in there.

The Court: Which tells you what the duties are, and how they are selected? I thought I read that.

Mr. Pittle: Well, there is no controversy about that. I am asking the witness if he is familiar with the authority.

The Court: Well, wouldn't the best evidence be what the Code itself says?

Mr. Pittle: I am not trying to prove the authority. I am asking the witness.

397 The Court: All right, ask him.

By Mr. Pittle:

Q. Are you familiar with the authority of the Navajo Advisory Committee? A. Yes, sir.

Q. As is existed prior to October, 1963? A. Yes, sir.

Q. Now, you have told us, as I say, that you previously testified in another phase of this present litigation.

Were you assigned to examine any documents in connection with this litigation, Mr. Young? A. Yes, sir, I was.

Q. Will you tell us what those documents were that you examined? A. During November, 1963, I was assigned to assist Stanley Zimmerman, a representative of the Solicitor's office, from the Department of the Interior, and my particular function and responsibility was to review the

minutes of the Tribal Council, the minutes of the Advisory Committee, and any other documents in the files of the Area office of the Navajo Agency or of the Tribe, that had a bearing on the attorney contract and especially with reference to discussions before the Tribal Council of new language incorporated in the 1957 revision;

And also to trace the development of Healing vs. Jones, or the Navajo-Hopi boundary case, as a claims case
398 under the terms of the revised contract.

Q. Who assigned you to this duty? A. The Area Director, Mr. Zimmerman.

Q. Now, as a result of your examination of those records, what did you find regarding the manner in which the 1957 contract had been approved by the Tribe? A. I found minutes, of course, relating to the meeting of August 7, 1957, the day upon which the preceding contract was due to expire.

Mr. Littell appeared before the Tribal Council on that day and gave a detailed report of legal matters that had been resolved by the Legal Department in the past for the Tribe, and he also covered in some detail pending legal matters that would require legal attention in the future.

And in order that there would be no lapse in attorney services, Mr. Littell recommended to the Tribal Council that they consider the approval of an interim agreement.

Q. May I interrupt you at this point and show you page 242 of Plaintiff's Exhibit A, entitled, Agreement Renewing and Extending the Attorney Contract Approved August 7, 1957.

Is that the interim agreement about which you are now talking, beginning on page 242? A. Yes, sir, I believe it is.

Q. All right, will you now continue?

Mr. Littell recommended the execution of an interim agreement, you were saying? A. Yes, sir.
399

Q. All right, go ahead. A. The interim agreement provided essentially for a continuation in force of the pre-

ceding contract for such time as may be necessary to negotiate and secure approval of the new one.

Mr. Wiener: If Your Honor please, we have this all in the record.

The Court: I was going to say, I think this is all in the record, isn't it?

Mr. Pittle: There is no question about it, that the record is the best evidence, but there is so much material, and so much writing, that Your Honor will have the choice of a decision whether to hear this expert's testimony regarding the differences, or hear arguments from counsel.

The Court: How long will it take?

Mr. Pittle: This part won't take more than two minutes.

Mr. Wiener: It is a legal document, but if Your Honor wants to hear it—

The Court: I am going to put you gentlemen to work after this case is over to prepare proposed findings of fact and conclusions of law, and I will adopt the ones I think are correct and reject the others.

400

By Mr. Pittle:

Q. All right, you may continue, Mr. Young. A. The interim agreement was approved by resolution of the Tribal Council and as I believe I began to say, it in essence continued in force the preceding contract and delegated to the Advisory Committee the authority to negotiate a new contract.

It also gave the Advisory Committee the authority to approve any amendments that might be necessary in the new contract over the old one, and it delegated to the officers of the Tribe the authority to approve a new contract on behalf of the Tribe.

During the Council meeting on August 7, as far as my review of the minutes reflects, there was no report given to the Council as to what types of amendments might be necessary within the body of the new contract.

So the interim agreement was sent to Washington for review and necessary approval, and this is where approval authority lies, and a few weeks later, early in September, I don't recall the exact date, the Commissioner of Indian Affairs advised by letter that in lieu of approving the interim agreement, he would authorize the parties, namely, the Tribe and Mr. Littell, to continue in force the preceding contract for a one year period, and during this one year period a new contract would be negotiated and approved.

401 On September 24, 1957, there was a meeting of the Advisory Committee, and during the search of the records at Window Rock, we found minutes covering this meeting.

Apparently, they had never been published and distributed, and we found them only in transcript form.

These minutes of the September 24th, 1957, Advisory Committee reflect the fact that—

Mr. Wiener: Your Honor, that is a written document and they are in evidence.

The Court: Aren't they in evidence?

Mr. Wiener: Yes, they are Plaintiff's Exhibit K, and I don't think we need a layman's comments on them.

Mr. Pittle: I beg your pardon, they speak for themselves, but they are 66 pages long, and I have to prove a negative fact. I don't have the proof of it unless I ask the witness who has made a study of it, whether it contains certain information.

The Court: Can't you stipulate that it does or doesn't contain it?

Mr. Pittle: I don't think we can get a stipulation. I doubt it.

Mr. Wiener: The exhibit is in, Your Honor.

Mr. Pittle: What number?

Mr. Wiener: It is Plaintiff's Exhibit K, and everybody can read it, and everybody can say what is and what
402 is not in it, and this exceedingly long trial is going to be dragged out.

The Court: What do you want to show that is not in there?

Mr. Pittle: I want to show that what is not in here is that in reviewing the minutes of the Tribal Council, this Plaintiff's Exhibit K for identification—

Mr. Wiener: No, that is in evidence.

Mr. Pittle: Plaintiff's Exhibit K, that there is no report by the Legal Department under the plaintiff, which gives any clear explanation or disclosure of this whole contract in 1957 and the new language which was inserted in it, to which the nine-man Advisory Committee had agreed originally.

Mr. Wiener: That is a matter of argument for Mr. Pittle when he drafts his findings.

The Court: Well, it is not in there, is it?

Mr. Pittle: I contend it is not.

Mr. Wiener: Well, I say it is there.

The Court: All right, it is a matter that you will have to point out.

Mr. Pittle: I am only asking this witness to point it out.

By Mr. Pittle:

Q. Mr. Young, in connection with your reference to the minutes of the Advisory Committee meeting of September 24th, 1957, which you have told us were discovered in November of 1963, as not having been distributed or published? A. Not to my knowledge. We found no publishing.

Q. You found a transcript copy? A. Yes.

Q. I show you Plaintiff's Exhibit K, which purports to be the minutes of the Advisory Committee meeting of September 24th, 1957, containing 66 pages.

Did you examine that report, Mr. Young? A. Yes, sir, I did.

Q. Now, will you tell the Court, in examining the minutes contained in Plaintiff's Exhibit K, did you find any report by the Legal Department which gave any explanation or

disclosure of the whole 1957 contract and the new language to which the nine-man Advisory Committee had agreed?

Mr. Wiener: I object on the ground that the exhibit speaks for itself.

The Court: I think it does. The exhibit is here.

Mr. Wiener: The exhibit is here.

The Court: At the proper time you can submit your findings as to whether it does or does not make them, and when they submit their proposed findings, I will have to decide which ones to adopt.

Mr. Pittle: May I say for the record then, if this is going to be one of the important issues, and the plaintiff
404 is going to take the position that it does show it, I suppose they are going to point to the page and the reference where it is shown, and then we will argue about it.

The Court: Very well. Is there anything further? Have you finished?

Mr. Pittle: Not quite, Your Honor.

The Court: All right, let us take the morning recess.

(Thereupon, a short recess was had.)

The Court: I meant to ask you this a while ago: Are you preparing an answer to the motion to strike the defense of unclean hands set forth in your answer?

Mr. Pittle: No, I am not preparing a formal motion, but I hope to argue it and dispose of it in court.

The Court: I may want to hear you on that point.

Mr. Pittle: All right, Your Honor.

The Court: I wish you would submit some kind of memorandum that I can consider.

Mr. Pittle: We will do that.

Mr. McKevitt: There are two motions.

Mr. Wiener: Yes, there were two motions, one was to strike the third defense, which was the failure to exhaust administrative remedies, and the second was to strike the unclean hands.

The Court: All right, we can come to that later.

By Mr. Pittle:

Q. Before we recessed, Mr. Young, you told us that you had examined all the published reports of the minutes of the Advisory Committee meetings and minutes of the Tribal Council meetings that you could locate; is that correct? A. During November, 1963, I reviewed the reports of the Legal Department to the Tribal Council in all of the sets of minutes between 1957, the date of the approval of the new contract, and 1963.

Q. Now, just before recess I asked you about the report of the Advisory Committee for September 24th, 1957.

Now, I ask you in your examination of the reports of the Legal Department to the Tribal Council, did you find any disclosure that the 1957 contract contained new language not contained in the 1947 contract? A. No, I found no discussion of the terms of the new contract where they deviated from the terms of the previous contract.

Q. Now, at this point let me ask you, approximately how many volumes of reports did you examine and for what period of the minutes of the meetings, Tribal Council meetings? A. I could only conjecture. There are usually about four or five meetings of the Tribal Council annually. I would guess that there are at least two volumes of minutes
406 that come out of each such meeting, and there was a period of about seven years.

Q. From when to when? A. From 1957 to 1963. So it would be somewhere in the vicinity of 25 to 30 volumes, I presume, of Council minutes.

Q. Now, in your review of the records of these meetings, did you find any reference to discussions relating to the increase in the General Counsel's compensation contained in Amendment No. 9 of the 1957 contract? A. Yes, sir, I did.

Q. Did you find any explanation or disclosure by the Legal Department in the minutes of these meetings that the 1957 contract contained language providing in substance that the General Counsel would not receive an increase in compensation for five years? A. No, sir, I did not.

Q. Now, in your review of the records of the meetings of the Advisory Committee and the Tribal Council, did you find any discussions or disclosures by the Legal Department to the Tribal Council that Amendment No. 11 to the 1957 contract exceeded the authorization of the resolution for Amendment No. 11? A. I am not sure I totally understood the question. Would you repeat it?

Q. I will break it down.

407 Are you familiar with Amendment No. 11 to the 1957 contract? A. Yes, sir.

Q. Do you recall it contains a provision putting Healing against Jones in the category of a claims case? A. Yes, sir.

Q. You are familiar with the resolution, which is in evidence, authorizing Amendment No. 11? A. Yes, sir.

Q. You recall it contained authorization to employ Leland Graham and to raise the compensation of one other attorney? A. Yes, sir.

Q. Do you recall further it contained no authorization to include Healing vs. Jones as a claims case in Amendment No. 11? A. It contained no such authorization.

Q. All right. Now, in your review of the records of the meetings of the Tribal Council or the Advisory Committee, did you find any disclosure or explanation by the Legal Department that Amendment No. 11 exceeded the authorization of the resolution authorizing it? A. No, sir, I found none.

Q. You didn't? A. No.

408 Mr. Pittle: I have no further questions.

The Court: Now, before you examine this witness, one of the difficult problems for the Court in this case, I think, is going to be this. All this evidence is coming in now which has to do with the issue of clean hands, I believe, and that you claim the plaintiff, or Mr. Littell, is not coming into court with clean hands, and therefore he is not entitled to equitable relief.

That is your contention?

Mr. Pittle: That is correct, Your Honor.

The Court: One of the difficult problems that I think is going to face the Court is this: Who is going to decide from this mass of evidence here, whether or not Mr. Littell did something that was improper or guilty of, we will say, some skulduggery work, or cheated the Tribe out of moneys that they lawfully should have had?

Am I to be the judge of that from all these records that you are putting in here today, and the files that have been going in this morning, and do I have to go through each letter or memorandum and say, in effect: Well, this was really claims work, but he put it under another category, or vice versa that he should have put it under?

Am I to be the judge of that?

Mr. Pittle: May I answer you in this way, Your Honor.

409 We have asserted that the plaintiff is coming into Court with unclean hands because of certain things he didn't do. He didn't make full disclosure of what he was doing in getting through Amendments to the contract which benefitted him at the expense of the Tribe, and that he owes a very high degree of trust in his attorney-client relationship to make disclosure to these people.

Now, we say he did not do this. This is a negative thing, and we are showing to the best of our ability that here are the records, we have examined them, we have experts that reviewed them, and we cannot find where this was done.

I submit, at this point, this would shift the burden to the plaintiff to contradict and deny it, and we will try to aid the Court in reference to it.

The Court: Well, now, you may have a conflict in the testimony or interpretation of what these documents or letters mean. Undoubtedly that is what might happen in this case.

Mr. Pittle: I don't think it will be so much interpretation as it will decision on what was done and not done, and ultimately what should have been done.

The Court: I can't help but go back to this original contract, paragraph 12.

Mr. Pittle: Well, that is termination, Your Honor.

The Court: I understand it is termination, but
410 looking at the whole matter objectively, and trying to get down to the real heart of the issues in this case, doesn't it come down to this: Here this case has been reviewed by the Court of Appeals, and they rendered, I think, a very learned opinion.

The majority opinion is clear to me, and I don't know how you feel about it, and I have seen times when I have criticized Appellate opinions, but I am bound by them, and it indicated the case should be tried on its merits, and I read you the footnote this morning.

Mr. Pittle: Yes, sir.

The Court: That is one of the things that tipped the scales in your favor when I ruled in your favor, and at your expense, to hear this case on the merits.

Now, we get up to a point in November. The first of November the Secretary cancelled his contract.

Mr. Pittle: Well, he suspended it.

The Court: He suspended it and called upon the plaintiff, Mr. Littell, to show cause, I think, on the charges, and he has a memorandum from Mr. Barry, the Solicitor.

Now, I think the big question is this: The Court of Appeals undoubtedly considered this very carefully.

What was the right way to go about terminating this contract? Did he have the authority to do it, the power to
411 do it in the way he did it, or should it have been done in the way that paragraph 12 specified it should have been done?

First, by taking the whole matter before the 74 regularly elected delegates who constituted the Council, the Tribal Council, the governing body, and put the whole matter before that body, and then by either a vote or whatever way they handle it to decide whether or not Mr. Littell did anything improper in connection with his services.

If he did, then there was a certain way they could do a certain thing. If, on the other hand, they came to a point as provided in this paragraph, which states: That in the event of a disagreement between the parties as to the sufficiency of the cause, the question shall be submitted to the Secretary of the Interior.

But that statement is not made until it first states, paragraph 12 states: The Tribal Council may terminate this contract for good cause shown in respect to any one or all of second parties' services—which means the lawyers—as General Counsel after giving sixty days notice to any of second parties in respect to which termination is sought.

Then the Court of Appeals underscored this language: The said termination to become effective upon approval of the Commissioner of Indian Affairs.

It still has to be approved by the Commissioner of Indian Affairs.

Then it says: Provided, however, that in the event
412 of disagreement between the parties as to the sufficiency of the cause, the question shall—and I will paraphrase this, as I am doing—shall then be submitted to the Secretary of the Interior.

The language is pretty clear to me as to undoubtedly what the Court of Appeals had in mind.

Now, why do we go into all this that took place in November, after the Secretary, solely, I suppose, as a result of your theory and argument, that even though the Secretary didn't have authority to do what he did, Mr. Littell cannot get the relief he requests in a court of equity.

Mr. Pittle: That is part of it, and I am going to show Your Honor, and I am trying to do it, and I am almost at the point now, where the original contract of 1947 with respect to paragraph 12, termination, provided that the contract could be terminated after the first five years by the Commissioner of Indian Affairs, period.

Now, it is true the 1957 contract contains the language which Your Honor has read several times since this case

started, and since it may be terminated only by the Tribal Council, but this witness just testified that there was never any disclosure to the Tribal Council of that change in language between the '47 and '57 agreement.

This happened before 1963. It was on record before then, but it was never presented to the Court of Appeals
413 because the Court of Appeals had nothing but the record in this blue book, which was the affidavit, and the only thing, as the Court of Appeals said in its opinion, that they were considering was whether the Trial Court abused its discretion in granting the preliminary injunction, which was ostensibly, of course, issued for the purpose of preserving the status quo to avoid irreparable injury.

Now, they did that. The plaintiff has been avoided irreparable injury.

But now we are talking about the merits, and I am going to show before this is over, and the trial is not going to take interminable, because I can be through in less than a day and a half, I believe on my direct, and I am going to show that many of the statements in the affidavits and the letters and the memoranda not only are self-serving but are absolutely false, and these are the letters and the documents on the basis of which the preliminary was granted.

Had there been a hearing with testimony and witnesses, instead of just having affidavits on preliminary, the Court of Appeals would have had the record that I am trying to make now, to show that even the statements by which the preliminary injunction was issued were not such as to entitle the plaintiff to any kind of an injunction, whether the Secretary had any authority or not. That he would just have to go back and the Court would leave him where it found him.

414 True, the Secretary might take this as the law of the case and not attempt to terminate, but the plaintiff would not have an injunction which as I pointed out before, it covers two other areas which are terribly impor-

tant in the continued performance and relationship of the contract.

And as I say, now I am well over half of my proof, and I think I have about a third left.

The Court: Do you want to answer?

Mr. Wiener: The only thing I want to say, Your Honor, is that we are now faced with something which was not suggested either in the pleadings or in the pretrial.

In the pleadings it was agreed that the Secretary proceeded under three grounds stated and the Solicitor's November 1st, 1963, memorandum, over-reaching, and raising his salary, and the Healing vs. Jones amendment improperly adopted, and using General Counsel on claims work.

Paragraph 9 of the answer admits that those are the grounds on which he went.

The answer also alleges unclean hands, and that these charges were so serious as to disentitle the plaintiff to equitable relief.

Now, the defendant is saying that the entire contract is tainted by fraud in its inception, which even hits the termination clause.

Now, I submit, with deference, and I don't want to
415 reargue Your Honor's ruling, and I am proceeding
under those rulings, but I submit this goes far
beyond that.

The Court: I think we should by all means stay within the issues framed at the pretrial hearing, not get into any collateral matters which might lengthen the trial.

Mr. Pittle: I am not trying to get into any collateral matters.

The issues before the Court for the preliminary injunction were the charges contained in the Secretary's letter.

The plaintiff is now seeking a permanent injunction and we filed our answer after the Court of Appeals opinion, in which we raised the issue, and, I don't think any matter that shows any taint or any failure is outside the scope of it.

The Court: Let me ask you something, and I don't want

you to concede anything, but would you be willing to admit or concede for the purpose of this case that the Secretary didn't have power to do what he did when he did it in November of 1963?

Mr. Pittle: If Your Honor makes a ruling, we are bound by the law of the case, but I cannot concede it because I believe with a full hearing and full argument that we have an opportunity, not only for another appeal perhaps, but for certiorari, which was not available from the interlocutory appeal.

The Court: You didn't apply for certiorari?

416 Mr. Pittle: We didn't apply for certiorari on the interlocutory appeal, because it wasn't on the merits, and we decided we will be back here anyway.

The Court: All right, let us proceed.

Cross Examination

By Mr. Wiener:

Q. Mr. Young, who was G. Warren Spaulding? A. Mr. Spaulding was the General Superintendent of the Navajo Agency until about 1959.

Q. And he had been for how many years when he retired? A. From approximately 1955 until 1959.

Q. Now, in your examination of the Advisory Committee minutes of the Navajo Tribal Council, what period did you cover? A. I recovered the period from 1957 to about 1963.

Q. Until the time of your examination in November? A. Yes, sir.

Mr. Wiener: May I have Defendant's No. 1, please?

By Mr. Wiener:

Q. Mr. Young, I show you Defendant's Exhibit No. 1, which is a copy of the resolution of the Advisory Committee of the Navajo Tribal Council, and ask you to examine it and tell me whether you have seen a copy or the original cover? A. I covered the period from 1957 to about 1963. before? A. Yes, sir, I have.

417 Q. And you are familiar with it? A. Yes, sir.

Q. Now did you find in your examination of the Advisory Committee minutes any minutes of the meeting at which this resolution, Defendant's Exhibit No. 1, was adopted? A. I don't remember, sir.

Q. As a matter of fact, Mr. Young, there were no formal minutes of the meeting at which this resolution was adopted, were there? A. I don't know, sir.

The Court: Are you talking about the Advisory Committee?

Mr. Wiener: The Advisory Committee meeting that adopted Defendant's Exhibit No. 1, June 25th, 1963.

The Witness: I don't recall having seen any minutes.

By Mr. Wiener:

Q. Do you know a Mr. Barry DeRose? A. I just recently met him in the last couple of days.

Well, I would like to reframe that. The first time I met him was at Tribal affairs.

Q. When was that? A. In 1963.

Q. When in 1963? A. In September of '63. All I did was—someone introduced me to him, and I shook hands with him.

418 Q. You had no conversation with him? A. No, sir.

Q. Do you know a Mr. Richard Schifter? A. Yes, sir.

Q. When did you first meet Mr. Richard Schifter? A. As nearly as I can recall, it was during the Council meeting that followed on the heels of the inauguration of Mr. Nakai. Mr. Schifter was at Window Rock, and someone introduced me to him.

Q. Did he make known his occupation to you? A. Yes. If he didn't, someone else did. I knew who he was, he was an attorney.

Q. And did you discuss with him any official business of the Navajo Tribe as distinguished from social amenities in passing the time of day? A. I don't recall having done so,

sir. The only subject of a serious nature that I can recall discussing with him was some housing project in Sioux country, and he indicated his interest in promoting public housing on Indian reservations.

Q. Did that conversation go to specifics of housing on the Navajo Reservation? A. I cannot remember, sir. I doubt it.

Q. Did you have further discussions with Mr. Schifter between the time of the one to which you have testified and November, 1963, concerning housing or any other tribal affairs of the Navajo Tribe of Indians? A. I don't
419 recall any, sir.

Q. Do you know a Mr. Allen Wurtzel? A. Yes, sir, I met him at the same time.

Q. Did you have discussions with him concerning Navajo Tribal affairs? A. Not that I can remember, sir; only housing.

Q. You talked housing to him also? A. He talked it to me, I guess.

Q. Were he and Mr. Schifter present at the same conference, at the same conversation? A. Yes, as nearly as I can recollect, because they both came to a meeting of the Navajo Tribal Council, and I happen to go to Window Rock at that same time at that meeting.

Q. So these weren't separate conversations, but a three-some between you and Mr. Schifter and Mr. Wurtzel? A. As nearly as I can remember, sir. It has been several years.

Q. It has been almost two years? A. Yes.

Q. Have you had further discussions with either Mr. Schifter or Mr. Wurtzel since the meeting and the conversation to which you testified? A. No, sir, I recall none. I don't believe I have run across them since that time.

Q. Mr. Young, I show you Plaintiff's Exhibit U for
420 identification and ask you if you are familiar with that document? A. Yes, sir. I so testified at the trial in March.

Q. Did you have anything to do with the drafting of Plaintiff's Exhibit U for identification? A. Yes, sir, I was requested, as I testified before, by some of the Tribal people to assist them in putting together this report of the litigation.

Q. And who were the Tribal people who made that request, Mr. Young? A. Mr. and Mrs. Denetsone.

Q. Did Chairman Nakai make the request also? A. I don't recall him having done so, except that he had indicated that he wanted to pull together all the documents relating to this case and putting them together in some form that could be distributed to members of the Tribal Council for an appeal.

Q. So that you are really the basic author of that document, Plaintiff's U for identification? A. With the understanding that the writing of it was largely my contribution, the ideas not necessarily all my contributions.

Q. Does Mr. Haverland—he is your superior, isn't he?
A. Yes.

421 Q. He is the Area Director at Gallup? A. Yes, sir.

Q. Did Mr. Haverland participate in preparing the final text of Plaintiff's U for identification? A. Yes, sir, he did.

Q. Are you familiar with his handwriting, Mr. Haverland's handwriting? A. Yes, I presume so.

Mr. Wiener: Will you mark this for identification please?

(The document was marked Plaintiff's Exhibit W for identification.)

By Mr. Wiener:

Q. Mr. Young, I hand you Plaintiff's Exhibit W for identification and ask you if you can recognize that document? A. It appears to be the prefatory portion of this document here.

Q. In other words Exhibit W for identification is an earlier draft of Exhibit U for identification? A. I wouldn't know without a careful comparison.

Q. Well, take a look. A. It appears to be the same.

Q. An earlier draft, in other words? A. Yes.

Q. Now, if you look at Plaintiff's Exhibit W for identification, you will notice penciled editorial revisions on
422 various pages. Do you see those? A. Yes, sir.

Q. And in whose handwriting are those revisions?
A. I wouldn't know.

Q. You don't recognize the handwriting? A. No.

Q. Is that Mr. Haverland's handwriting? A. I would not testify that I know for a fact that it is his handwriting, sir.

Q. How about over on page 2? A. I can only say it could be, but I can't verify it.

Q. It is a fact, isn't it, Mr. Young, that Mr. Haverland did participate in the final version and the final revision of the white paper, Defendant's U for identification? A. Mr. Haverland and I both assisted the members of the Tribe to prepare this report.

Q. Now, will you state whether you consider it is properly part of your duties as Tribal Operations Officer working under the Secretary of the Interior to assist the Chairman of an Indian Tribe in his controversy with a General Counsel, who had a duly approved contract with the Indian Tribe whom they were both serving?

Mr. Pittle: I object to the form of the question, if the Court please. There is no objection if the witness is asked what he did.

423 The Court: Well, he can answer the question.

The Witness: Our own Indian Affairs Manual requires us to be alert to the needs for distributing and disseminating information among the members of tribal groups and to do everything possible to see that they are properly informed about things.

By Mr. Wiener:

Q. Now, the question, Mr. Young, was: Did you consider it a part of your duties to take sides in a controversy

between the Chairman of the Tribal Council and the General Counsel of the Tribe? A. The intent was not to take sides. The intent was to set forth information pertaining to the particular controversy.

Q. Is it your position, Mr. Young, that the white paper, Plaintiff's Exhibit U, is an objective appraisal of the controversy between Messrs. Nakai and Littell? A. Yes, I believe it is.

Mr. Pittle: I object to the characterization of objective, as a conclusion. The document speaks for itself.

The Court: I haven't read the document. Was this referred to in the former trial?

Mr. Pittle: We have testimony on this.

The Court: I mean the contempt proceeding?

Mr. Pittle: Yes, sir.

Mr. Wiener: The terms of the document did not appear.

424 What I am endeavoring to show is that when the controversy between Mr. Nakai and Mr. Littell erupted, and this document is dated November the 18th.

The Court: You used the word erupted?

Mr. Wiener: Erupted, yes, sir.

The Court: That is a good word.

Mr. Wiener: When the controversy erupted or was at its height, and this is dated November the 18th, 1963, which was after the Secretary's action and termination, and I want to show that at that time the Bureau of Indian Affairs through its employees dealing with Tribal officials took sides in a controversy within the Tribe.

That is why I asked the question.

The Court: Does this go to the purpose of affecting his credibility as a witness, to show that he became biased or interested or prejudiced?

Mr. Wiener: Yes, it can go to that, and it also goes to prove paragraph 10 of the allegations of the complaint.

The Court: Let me look at 10 again. Do you have it?

Mr. Wiener: The complaint is right at the beginning of Plaintiff's A.

And it also goes to bias, of course.

The Court: You know, the way the case is going, obviously, it may reach the Court of Appeals again some
425 day, whichever way I decide the case, one way or the other.

So that they will get the whole picture of this controversy, may I make this suggestion, and if there is any objection to it, of course, I won't do it, but I think that the Court of Appeals is entitled to have before it at the proper time everything concerning this controversy, including the testimony that was taken before me in the contempt proceeding, and the ruling I made from the bench, in an oral opinion, and this would give them a complete picture of everything in this case at the proper time.

Now, if there is any objection, I won't pursue the matter any further.

Mr. Pittle: None whatever.

The Court: I am thinking ahead when this case gets to the Court of Appeals some day.

Mr. Pittle: We have agreed, Your Honor, that the entire proceedings before you last spring in the contempt shall be part of this record.

I am not objecting to this document. I am objecting to the form of counsel's question.

The Court: Well, I didn't see that there was anything in the form of the question that is objectionable.

Mr. Pittle: He assumes that this white paper, this so-called white paper, is evidence of the Bureau having
taken sides.

426 Now, that is a matter of argument. I think the document speaks for itself.

The Court: Well, let us find out what it is.

By Mr. Wiener:

Q. Did you consider that in Plaintiff's U for identification, which you drafted, you set forth impartially the issues in the controversy between Mr. Nakai and Mr. Littell? A. Plaintiff's Exhibit U, sir?

Q. Which is the white paper? A. Did I feel that I set forth clearly—

Q. Fairly? A. Fairly, the position?

Q. Yes, sir. A. Yes, sir, to the extent that I participated in the drafting of this document, I feel that I did so.

Mr. Wiener: I have no further questions, Your Honor.

Mr. Pittle: I have no further questions.

The Court: All right, you may step down.

(The witness was excused.)

The Court: I take it then, Mr. Pittle, that the testimony given in the contempt proceeding is part of this record here?

Mr. Pittle: Yes, Your Honor, we so stipulated at pre-trial.

427 The Court: Is that agreeable, Mr. Wiener?

Mr. Wiener: To release Mr. Young?

The Court: No, no.

Mr. Wiener: I am sorry I didn't hear you, Your Honor.

The Court: The suggestion I made was that we incorporate by reference and make it part of the record in this case the prior contempt proceeding.

Mr. Wiener: Oh, yes, as a matter of fact, I was going to introduce it as bearing on the scope of relief.

The Court: I think it is a fair thing to both sides.

Mr. Pittle: I thought we had agreed it is part of the record. It is in the Court's record, and it is already here.

The Court: Well, the volumes will be introduced.

Mr. Wiener: That is what I had in mind, Your Honor.

The Court: All right.

Mr. Wiener: I have no further questions of Mr. Young, and so far as we are concerned, he may be excused.

428 Mr. Pittle: Mr. Barry DeRose, please.

Thereupon

Barry DeRose

was called as a witness by the defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Pittle:

Q. Your full name is Barry DeRose? A. Yes, sir

Q. And you live in Globe, Arizona? A. Yes, sir.

Q. What is your profession, Mr. DeRose? A. I am an attorney.

Q. Are you in private practice? A. Yes, sir.

Q. How long have you been practicing? A. Since April, 1946.

Q. Do you also practice in Phoenix? A. Occasionally, yes.

Q. And anywhere else? A. Yes; in Navajo, Apache, Pima and Graham Counties.

Q. Arizona? A. Arizona, yes, sir.

Q. In 1963, did you have occasion to visit the Navajo Indian Reservation at Window Rock? A. I did.

429 Q. More than once? A. Yes, sir.

Q. Will you please explain the circumstances under which you made your first visit and telling when it was? A. In May of 1963, I received a call from a Vern Bugge, whom I did not know.

He was in Phoenix, Arizona——

The Court: Excuse me, how do you spell that name, B-u-g-a-y?

Mr. Pittle: I think it is spelled B-u-g-g-e, Your Honor, but sometimes it is shown in documents as B-u-g-a-y.

The Court: All right.

The Witness: And he asked if he could have a conference with me, and I told him I was going to the Fort Apache Indian Reservation that afternoon, but I would be happy if he would like to ride out with me, so he came up and showed me a letter from Raymond Nakai.

By Mr. Pittle:

Q. To whom? A. To him, stating that he, Vern Bugge, was a consultant and authorized to represent the Chairman

in business transactions, and he then talked to me about the relationship between the White Mountain Apache Tribe, the Bureau of Indian Affairs, and the attorney, and I rode in his car, and my wife, who acts as my secretary part-time, went ahead, and we went to White River, Arizona, 430 which is the capital of the Fort Apache Indian Reservation and he asked me then to gather the Bureau of Indian Affairs officials and part of the Tribal Council together and he wanted to talk to them.

Q. At White River? A. At White River.

Mr. Wiener: Would you ask the witness who "he" is?

By Mr. Pittle:

Q. You are referring to Mr. Bugge, are you not? A. Yes, sir. And we had a conference, and we parted, and I heard no more about Window Rock until I received a call later from Washington, D. C., from Richard Schifter.

Q. Before we get into that, Mr. DeRose, you mentioned the White River Apaches.

Will you explain the reason for your visit to them? A. I am the tribal attorney for the White Mountain Apaches.

Q. You are the tribal attorney? A. Yes, sir.

Q. Why did Mr. Bugge want you to call, if you know—did he say why he wanted you to call the tribal officials at that meeting? A. He said, he stated that the relationship at Window Rock was so terrible, and they didn't get along, and he stated that our tribe had a reputation for pro- 431 gressing, and he wanted to know how we did it.

Q. All right, sir, then you say——

The Court: He wanted to know what?

The Witness: How the White Mountain Apaches accomplished and had progressed, with their recreation, with their timber, and with their cattle industry.

By Mr. Pittle:

Q. And you were saying that you then received a telephone call? A. From a Richard Schifter, in which he asked

me if I would be interested in assisting him on a local level in establishing a public housing authority on the Navajo Reservation.

Q. Did he tell you who if anyone recommended you to him? A. He might have but I don't remember if he did.

Q. Then what happened? A. Then I received another call, and I don't know who this was from, from Window Rock, telling me that Mr. Schifter was coming to Window Rock and would I please be there.

Mr. Wiener: May we have the time fixed, Your Honor?

By Mr. Pittle:

Q. About when was this? A. This way in May of 1963.

Q. Did you go to Window Rock? A. I did.

432 Q. Shortly after that call? A. Yes, sir.

Q. Can you tell us who you met with at Window Rock? A. The first one I met was Mr. Vern Bugge, and we met, and then went to Gallup, and met Mr. Schifter, who came in on the train, and from then on, I met with a number of individual Navajos, who literally begged me to meet with them.

Q. What was the principal topic of your discussion with these people? A. I would say the principal topic was Mr. Norman M. Littell.

Q. Did they seek your advice with respect to any matters? A. They certainly did.

Q. What was it they wanted you to advise them on? A. They asked me about this Public Housing Act.

They asked me about the Navajo Development Corporation, and which I studied, and they asked me about the cattle, about recreation, about how allowing liquor to be sold on the Reservation, the pros and cons of it, and they asked me to write speeches for them.

They asked me to meet at night with them, groups of them.

Q. Were you ever actually retained by any of them as counsel or by the Navajos? A. When you being paid, no,

I was never paid anything. I paid my own expenses,
433 hotels, et cetera, and I have never been reimbursed.

However, Mr. Schifter prepared a contract, which was a 90-day contract, in which each of us was to receive \$1,000 a month, and I signed this contract, as consultants, and I believe Nelson Damon, the Vice Chairman, signed it, but as far as I know, it was never consummated in that it was never put through for approval by the Bureau.

Q. I show you page 3 of Plaintiff's Exhibit R for identification, purporting to be a contract of June 17, 1963, apparently signed, a copy of it, apparently signed by Raymond Nakai, Barry DeRose, and Allen Wurtzel.

Is that your signature? A. Yes, sir.

Q. Will you look at this document and tell me if this is the contract that was prepared, and you signed, that you just mentioned? A. Yes, this is the contract.

Q. You say you signed this contract, sent it back, but you never received word of acceptance? A. No.

Q. Did you ever receive any compensation under the contract? A. No, sir.

Q. Or otherwise? A. No, sir.

434 Q. Now, you were telling us that you met with a number of people.

How long were you in Window Rock approximately at the time of your first visit in May, 1963? A. I guess, a week, maybe two weeks.

Q. I call your attention to page 15 of Plaintiff's Exhibit A, which is an affidavit by the plaintiff in this case, and page 257 of Plaintiff's Exhibit A, which is a copy of a letter to the Secretary of the Interior by the plaintiff in this case, and ask that you will note a reference first on page 15, that one or more of said attorneys attended secret meetings of the Advisory Committee, the attorneys being referred to are Richard Schifter, Allen Wurtzel, and Barry DeRose.

Then on page 257, in the letter, you will note the statement: At the same time, Barry DeRose has also collaborated with Larry Davis in a libel suit;

And then, did you know, for example, that Barry DeRose appeared at the secret meeting in the pilots' room at the airport at Window Rock on October 3d—and I guess October 3d would be starting your second week? A. Yes.

Q. Now, let me ask you the general question: Did you ever attend any secret meetings? A. They weren't secret. I attended those meetings.

Q. Now, you were saying that you were in Window
435 Rock approximately a week at the time of your first visit in May 1963? A. Yes.

Q. And you told us generally about the matters on which your advice was sought.

Now, did you furnish advice to groups that you were meeting with? A. I did.

Q. And who were these groups of Navajos? Do you know their position or their names? A. Well, the Vice Chairman, the Chairman, his Administrative Assistant, and many members of the Council, 12 or 13 of them.

Q. Now, is that all that happened at the time of your first visit to Window Rock? A. That is all I can think of.

Q. Now, in your discussions—you did furnish advice, you were telling us? A. I certainly did.

Q. Now, will you tell the Court what advice you furnished these people? A. Well, it was brought, Norman M. Littell's contract was brought to my attention, especially in reference to Amendment No. 11, and they asked me if I thought

436 this was right of an attorney, they were talking about ethics, and when I read the resolution, and having represented Indian tribes and been before them for a number of years, and knowing their little knowledge of the English language, and their faith that they put in their tribal attorney, I flatly told them I was shocked at putting in an amendment to a contract without first divulging all the information to your client, and especially when you drafted the contract.

Q. All right, now, let me ask you this:— A. That was the advice I gave them.

Q. Now, let me ask you this in connection with the contract. You say you examined the contract, and you noted, of course, that Mr. Littell had been retained by the Navajo Tribe as its General Counsel and as its Claims Attorney for a period of ten years from 1957? A. Yes, sir.

Q. And this was in 1963, May, that you were there advising these people? A. That is right

Q. As an attorney did you consider the question of whether it was ethical for you to meet with these tribal officials in the light of Mr. Littell's contract as Tribal Attorney? A. I considered it.

Q. What was your position? A. I thought that being a member of the law profession, and knowing the bad
437 public image that we have anyway, that it was not only my right but my duty to represent these people.

Q. Did you consider anything in the contract or its amendments that precluded the tribal officials from seeking legal assistance or advice from other sources than its General Counsel and Claims Attorney? A. I saw nothing.

Q. Now, after the meeting in May, 1963, did you have any further correspondence or conversations with anyone regarding the affairs at Window Rock? A. Yes, sir.

Q. When was that? A. Well, I left there May 31st and was back up there in June.

Q. That was the occasion of your second visit to Window Rock? A. Yes, sir.

Q. What were the circumstances that lead to that visit? A. That was principally on the Public Housing Act. I believe that Mr. Littell was against the Public Housing Act in its present—the way the ordinance was drafted. In fact, I know he was.

Q. What was the basis for that? A. So they wanted me to come up and appear before the Council and see if
438 we could not get the Council to approve this housing ordinance.

Q. Who is it that wanted you to come up? A. Mr. Nakai and Mr. Schifter.

Q. And when you arrived there, you say about June, June 2d, did you say? A. In the first part of June, before June 14th.

Q. How long were you there at Window Rock? A. Say approximately a week.

Q. And who did you meet with during the course of the week, other than Nakai and Schifter? A. Allen Wurtzel was there, and met with the same group of people again.

In fact, they have been down to, I believe some of them, had been down to Globe in the interim to see me, and then I appeared before the Tribal Council for one entire day and explained the Act, and in addition, I met with Leo Denetsoni and his wife, on a number of occasions.

Q. You appeared before the Tribal Council and explained the Act, you mean, the Housing Act? A. Yes, sir; and the Council passed it.

Q. Was Mr. Littell present at that Council meetings? A. No, I don't believe he was.

Q. Were you invited to attend? By whom? A. By the Chairman.

439 Q. In addition to explaining the Act before the Tribal Council, were you called upon to render any advice to the Tribe or tribal officials at that time? A. Yes. It was a constant thing, asking me questions, not only about Mr. Littell, but other matters.

Q. What other matters in general? A. Recreation and industrial development.

There was tremendous unemployment among the Navajo Indians. I would say it is possibly as bad as any section of the United States, and they were very much interested in wanting to get new industry started.

They also had, because of previous acts, I don't know by whom, but the relationship with big business and with organized labor was terrible.

They had a gray area on the Navajo Indian Reservation. This had been established under Davis Beatty, whereby all of the crafts, including the laborers, are paid \$2 more an

hour than any other section of the State of Arizona, and this is because of the poor relationship between labor and the Navajo Indian Tribe.

Q. How did you ascertain this fact? A. By consulting with the crafts, and by organized labor in Phoenix to try to do something about it.

Today they are building houses in New Mexico, but they cannot build any of these public houses in Arizona because of this high rate. The Government won't allow
440 that much money to be put into a public house.

Q. What is the high rate due to, sir? A. Due to the fact that past poor relationship of organized labor, that this might be run off the reservation, and not being allowed to get people in unions, and not being allowed to picket.

Q. Did you ascertain—

The Court: All right, just a minute.

Is there objection?

Mr. Wiener: I don't see that this has anything to do with the charges, since Your Honor is the District Court, and not the NLRB. I don't see that it has any relevance.

The Court: I have got my own problems as it is.

Mr. Pittle: Your Honor, we have heard a lot about Mr. DeRose's activities at Window Rock. I am trying to show fully what he did, and how many times he went there, and who he saw.

The Court: He can cover it.

By Mr. Pittle:

Q. Did you ascertain the reason for the bad relations with labor and the gray area, the existence of the gray area that you mentioned? Did you ascertain what this was due to? A.

I certainly did.

441 Q. Will you tell us? A. Norman M. Littell.

Q. Can you give us some details?

Mr. Wiener: I think that is objectionable as a conclusion, Your Honor.

The Court: Well, if it is a statement of fact, what he did, and let the Court draw its own conclusion.

Mr. Wiener: May I withdraw my objection? I think it clearly shows the witness' bias, and therefore should be withdrawn.

The Court: The objection is withdrawn.

Let us proceed.

The Witness: Mr. Bonitas—I can't remember who was the head of the carpenters, and these fellows stated—

By Mr. Pittle:

Q. Who are they? A. They are the head of the different crafts in Arizona, and have stated that Mr. Littell had in effect told them that they were not wanted on the Navajo Indian Reservation, that he would have through his direction, or indirection, and his legal staff, they were told not to picket, and not to try to get any of the Navajos in labor unions, and their dislike for him was tremendous.

And the effect was that there is the gray area.

My conclusion and my judgment is because of this animosity between the two groups, that there is this
442 high rate on the Navajo Reservation.

Q. Did you confer with any members of the Tribal Government or the Tribal Council with respect to the question of terminating Mr. Littell's contract of 1957? A. I did.

Q. Will you tell us how those conferences came about? A. As well as I remember, when I first got to arrive on the Navajo Reservation, and after talking to Schifter about the Housing Act, I was cornered, and I believe it was by the Vice Chairman, and he wanted me to meet with this group, and then they brought with them all the contracts, and then they asked me to read them, and I did, I spent the next day studying them, and then it was pointed out to me by Denetsoni, especially this Amendment 11, and then I advised them that, in my opinion, that this was just cause for terminating the contract.

The Court: All right, I think we will suspend and recess until 1:45.

Mr. DeRose, I suggest that during the luncheon recess that you not discuss your testimony with anybody.

The Witness: Including the attorneys, sir?

The Court: Well, I mean, I imagine if you want to go to lunch and to talk about things generally, but I mean talking about anything that you are going to say on the stand. I imagine you have talked to your attorney already.

The Witness: Yes, sir.

443 The Court: All right, we will recess until 1:45.

(Thereupon, a recess was had from 12:30 o'clock p.m., until 1:45 o'clock p.m.)

444 AFTER RECESS

(The trial was resumed at 1:45 o'clock p.m., pursuant to the recess.)

Thereupon

Barry DeRose

resumed the witness stand pursuant to the recess and testified further as follows:

Direct Examination (Resumed)

By Mr. Pittle:

Q. Mr. DeRose, did you take any part in the campaign of Chairman Nakai during the 1963 election for Chairman of that Council? A. No, I didn't.

Q. Did you ever take any part in the tribal politics? A. No.

Q. Now, you have told us about your first visit to Window Rock in May, 1963. Now, you visited the reservation a second time? A. Yes, in June.

Q. And did you complete your answer to my question, who you conferred with during that visit and the subject of your discussion? A. I conferred with, as I say, there was 10 or 12 people; in addition with Mrs. Annie Wauneka, and with the Superintendent of the Bureau and his assistant, and I believe some people that were inter-
445 ested in the development board, or one of their representatives.

Q. Now, with respect to your conference or conversation with Mrs. Wauneka, I call your attention to Plaintiff's Exhibit A, beginning on page 254, the letter of August the 12th, 1963, addressed to the Secretary of the Interior—I beg your pardon, on page 256, the letter of October the 22d, 1963, addressed to the Secretary of the Interior?

The Court: What was the page number?

Mr. Pittle: It is on page 256, Your Honor.

By Mr. Pittle:

Q. And it is followed by a letter beginning on page 261 of Plaintiff's Exhibit A, of October 23d, 1963, from the plaintiff to the Secretary, with an enclosure which consists of, as described in the letter, a report of a conversation between you and Mrs. Wauneka.

First, I will show you a copy of the letter, beginning on page 256, and ask you if you had occasion to examine this letter recently, along with a letter of October 23d, 1963, from Mr. Little to the Secretary, and the enclosure, which is the report of the conversation beginning on page 262.

Will you look at this and tell me if you have had an occasion to examine them recently? A. Yes.

Q. You have examined them in my office the other
446 day? A. Yes, sir.

Q. Now with respect to a statement on page 257, where Mr. Littell is informing the Secretary of the Interior, that: At the same time—referring to something that occurred just before that—Barry DeRose has also collaborated with Larry Davis in a libel suit in Phoenix against the writer, Mr. Littell.

Do you know who Mr. Larry Davis is? A. Yes, I know where he is.

Q. Who is he? A. He is an attorney in Phoenix who used to be the staff at Window Rock.

Q. Working for the Legal Department under Mr. Littell?
A. Yes, sir.

Q. Did you ever confer with him about a libel suit? A. Yes, I think I did talk to Larry, not about libel, not about his libel suit, except in reference to some minutes, I believe, some meeting he mentioned to me about.

Q. Did you collaborate with him? A. No, I did not.

Q. What did you do? A. I didn't do anything.

Q. Then the next statement is where Mr. Littell asked the Secretary:

Did you know, for example, that Barry DeRose appeared at a secret meeting in the pilots' room at the airport at Window Rock on October 3d with Raymond Nakai, and also with two other hopeful attorneys from Santa Fe, one Fred Standley, recently campaign manager for Congressman Joe Montoya, and his partner, Walter Kegel.

Did you attend a secret meeting as described? A. No, there was no secret meeting. I attended a meeting there, someone called me from Window Rock and asked me to come up and meet with a group, but Mr. Nakai wasn't there.

Q. Now, with respect to the statement, with two other hopeful attorneys, do you know what they may have been hopeful about? What the reference is to? A. I presume they mean that they want to be representing the Navajo Tribe.

Q. During your conversations at Window Rock with tribal officials, were you ever considered for the position of general counsel to represent the Navajo Tribe? A. I was not.

Q. Now on page 258, the first full paragraph, contains the statement:

At this time, Barry DeRose, along with Mr. Richard Schifter, et cetera, were retained at \$1,000 a month for a fixed period as consultants?

I believe you told us this morning that you were not actually retained? A. No, this contract was never consummated. I don't know what ever happened to it but I was never paid.

Q. You told us that you were not paid anything? A. No, sir.

Q. You were not paid anything by the Navajo Tribe? A. That is right.

Q. Were you ever paid anything by the Navajo Tribal Housing Authority? A. I haven't been paid anything, but I will be paid \$250 a month for I think a three or four month period I worked for them.

Q. For the time you have already worked for them? A. Yes, sir.

Q. When you say, you will be? A. Yes.

Q. By the Housing Authority? A. Yes, sir.

Q. Now, if you will turn to page 261 of Plaintiff's Exhibit A, a letter of October the 23d, 1963, to the Secretary of the Interior by Mr. Littell, and in the first paragraph he informs the Secretary:

In all fairness, that I should send you the enclosed excerpt of conversations, one of many, between Barry DeRose and Annie Wauneka, as well as others from time to time.

And now if you will turn to page 262, there pur-
449 ports to be set out a report of the excerpt of conversations.

First, did you have more than one conversation with Mrs. Wauneka? A. That is correct. I had two.

Q. You had two? A. Yes.

Q. How did those conversations come about? Did you just happen to meet or did somebody request you? A. Let's see, Mrs. Wauneka requested me on at least three occasions to meet with her.

One time she was staying at the Apache Land in Globe, Arizona and asked me to come to her motel, and I wasn't home when she made the call, but I did not meet with her that time.

Then she asked me at Window Rock—

Mr. Wiener: Just a second, please. May we have the date fixed?

Mr. Pittle: I don't know what the date is. It is not stated in Mr. Littell's letter.

I will ask the witness if he remembers when the first conversation was.

Mr. Wiener: The conversation to which the witness has referred.

By Mr. Pittle:

Q. When was that, sir, the first conversation? A. The first conversation?

450 Q. You did say you had two conversations? A. Yes.

Q. When? A. And I cannot remember whether the first conversation was the one in the Chairman's office, or at Mrs. Wauneka's house. I can't tell which one of those was first.

I think there was a close proximity of time.

Q. All right, now you were telling the circumstances. A. Which would be in June, 1963.

Q. You were telling me about the circumstances under which these conversations came about. She requested you, did she? A. She didn't request me on that conversation in the Chairman's office.

I walked in there, and Mr. Gorman, and the Chairman, and Mrs. Wauneka, and Allen Wurtzel were there, and it just happened that I walked in.

Q. And what about the other conversation? A. The other conversation, she requested me on at least two or three occasions that she would like to talk with me and discuss this matter.

Q. Now, what matter? Did she tell you what the matter was? A. Yes, the difficulty of the Chairman; her differences with the Chairman.

451 Q. Mr. Nakai? A. Right.

Q. Now, did she ask you to discuss anything with respect to the General Counsel's contract at either one of

these times? A. We discussed it but I don't know whether she asked me or not.

Q. Now, if you will look at page 262 of the reported conversation, and you have had occasion to read that before, can you tell us approximately when that conversation may have taken place, and which one was this? A. This was the one at her daughter's house, and the one that she requested me to attend.

Q. Also about June, 1963? A. June, 1963.

Q. Do you know whether a recording was made of that conversation? A. I heard there was a recording made of it.

Q. You say that you heard that there was? A. Yes.

Q. Did you see a tape recorder or any other kind of recording machine? A. No, sir.

Q. Was anyone there taking notes? A. No—Yes, yes, Mr. Cavanaugh, Wade Cavanaugh.

452 Q. Who is he? A. He is a reporter for the Republic. He was there and he made some notes.

Q. Do you know whether he was taking down the conversation verbatim? A. No, he wasn't.

Q. Now, at this point, before going into the statement contained in this reported conversation, I would like to ask you two questions.

Were you ever Mr. Udall's campaign manager? A. No, I was not.

Q. Did you ever have any part in any of his campaigns for Congress or otherwise? A. Only that I was for Secretary Udall, and voted for him, and that is about the extent of it. I didn't go out and campaign for him.

Q. Did you occupy any position in the party organization that supported him? A. Yes, I was County Chairman of the Democratic Party. In fact, when Mr. Udall first ran for Congress, I campaigned for a fellow by the name of A. B. See, who ran against him, and who was Corky Patton's administrative assistant.

Q. Now, did Mr. Udall have anything to do with your association with the Navajo Tribe, and your conversations,

and your visits, and your consultations as far as you
453 know? A. Did he have what?

Q. Anything to do with that? A. Oh, we had a conversation with him.

Q. No, you misunderstood my question.

Do you know whether Mr. Udall had anything to do with your being consulted by the tribe about anything? A. Not to my knowledge.

Q. Now, going back to the reported conversation as submitted by Mr. Littell to the Secretary, beginning at page 262.

The statement is made: After Nakai left, Barry DeRose tried again to show us the resolution that was passed previously, where the mistakes were and what has been done.

Do you know what resolution was being referred to there? A. This is on page 262?

Q. Yes, the last full paragraph, the first sentence. A. I think that she was referring to the resolution appertaining to Amendment 11, which is the resolution authorizing increasing Mr. Walton's salary from \$8,500 to \$9,000, and hiring Leland Graham of Washington.

Q. And Amendment 11 does that, and also makes Healing and Jones a claims case, as we know? A. Yes.

Q. And then she states: I should add that when
454 Howard Gorman insisted on our going to Washington to straighten out the possible amendment to the housing ordinance in respect to sovereign immunity, Barry DeRose said, and there is a quotation, "Mr. Littell has met with the Housing Authority legal counsel there and everything is recorded by both parties, and there is nothing to gain by making a trip to Washington."

Did you make that statement? A. Yes.

Q. Will you tell us the circumstances, as you recall them, leading to your making such a statement? A. Well, Mr. Littell objected to the wording of the housing ordinance, stating that the Navajo Tribe would lose their sovereign immunity if they signed this ordinance, and that he, Annie

Wauneka or Howard, told me that he was going to talk to the lawyers there, and he would get it changed, and I said: He had already talked to them, and they told him that this ordinance was the one used practically all over the country, and they weren't going to make any changes for him.

Q. All right, have you finished? A. Yes, sir.

Q. The rest of the quotation is that you said: Mr. Littell has nothing to offer you because I have been told that this is the way the ordinance stands, and Mr. Littell is out.

Now, did you make the statement? A. I didn't say he was out.

455 Q. What did you say? A. Just what I previously repeated.

Q. All right. Now, the third paragraph on page 263 of this reported conversation reads:

Barry DeRose said that the resolutions regarding the attorney contract were passed by the Council according to the wishes of Mr. Littell, but there are some things that were not told to the Council which should have been told to the council.

She is referring there to the resolution for amendment No. 11 again, is that correct? A. Yes, sir.

Q. Did you make that statement in substance? A. I believe I did.

Q. Then you are supposed to have gone on to say, He said, referring to you: That Mr. Littell had amended the contract after the resolutions had been passed, without authority. DeRose said the resolution was passed in good faith and later Littell did as he pleased with it. Littell put in any language he wished to and never reported it back to the Council. Barry DeRose said there were irregularities in the attorney contract and tried to point out to us that these were the things that he was trying to make known to us. Howard Gorman even went ahead and said, "Barry, I understand that our names were mentioned in the

456 Advisory Committee. What was the discussion? Why were our names mentioned?"

Now, did you make those statements in substance at that conversation? A. Yes, sir.

Q. Sir? A. Yes, sir.

Q. Is that a full and fair report of it? A. Yes, sir.

Q. Now, the next statement:

Barry DeRose said, "Yes, I told the Advisory Committee that one of them should get to either or both, meaning Howard Gorman and Annie Wauneka, and I told them to take you two away from these people." And I understood he meant to keep us away from Maurice McCabe and Norman Littell.

Did you say that? A. Well, I certainly didn't say it that way.

I said that instead of this fighting and constant bickering and battling on this reservation, that you people should sit down with Annie Wauneka and Howard Gorman and see if you cannot work it out.

Q. Now, the next statement: Howard Gorman said, "What business have you or anybody on the Advisory Committee telling me who to deal with?"

Do you recall Mr. Gorman making that statement? A. In that previous sentence too, and I understand he
457 meant to keep us away from Maurice McCabe and Norman Littell, Maurice McCabe and I had been friends for many years, and I had no inclination of keeping them away from McCabe or Norman Littell, as far as that is concerned.

Q. Now, the next statement which I just read is Howard Gorman's statement.

Did he make that statement while you were there, sir, what business have you or anybody on the Advisory Committee telling me who to deal with? A. I can't remember whether he made that statement or not.

Q. Do you recall any discussion following that statement, if it was made? A. Yes, I believe that unbeknownst to me, they were voting on the housing ordinance.

Q. Who was, the Tribal Council? A. The Tribal Council, and Raymond Nakai left the room, and someone told

me, I think it was Allen Wurtzel, that they were going to vote on the housing ordinance and not come back to Washington and discuss it, and I told Annie and Howard that they should get over there.

Q. Now, the next statement is: With that, we dropped the discussion. During all of the discussion, Barry DeRose had a blue backed notebook with him. It was a blue canvas covered notebook as thick as a volume of the budget,
458 about three inches thick.

Did you have such a book? A. Yes, sir.

Q. Was it canvas covered? A. No.

Mr. Pittle: Will you mark this for identification please as Defendant's Exhibit No. 18?

(The document was marked Defendant's Exhibit No. 18 for identification.)

Mr. Pittle: This being a bound notebook entitled Navajo Tribal Attorney Contract and Amendments.

By Mr. Pittle:

Q. Now, I show you Defendant's Exhibit No. 18 for identification, Mr. DeRose, and tell me if you can identify it?

A. Yes, this is the book described as the canvas notebook.

Q. What does it contain generally? A. It contains all the contracts, amendments, and resolutions of Mr. Littell's attorney contract.

Q. His attorney contract? A. Yes.

Q. Now, during that conversation, did you and Mrs. Wauneka have discussion set forth in substance at page 264, in which she said that she would like to learn more about the matters relating to Mr. Littell's attorney
459 contract? A. Yes, we had a conversation.

Q. And you agreed to meet at her daughter's? A. Yes, sir.

Q. And you did meet with her at 3:00 o'clock at her daughter's? A. Yes, sir.

Q. And who else was present? A. Wade Cavanaugh and myself and Mrs. Wauneka.

Q. All right, now, sir, will you turn to page 265.

About three inches from the bottom is the statement: So we cleared that up first. Barry DeRose then opened up the blue book and showed me a resolution that was passed by the Council in renewing Mr. Littell's contract. He showed me where Mr. Graham has replaced Mr. Alexander without the consent of the Tribal Council.

Do you recall that? A. No, sir, I didn't tell her that.

Q. Did you refer to that at all? A. No, I didn't refer to Alexander. I just showed her where Leland Graham was hired, and where Walton's salary was increased.

Q. And then she said, I said, "Did he do that?" There was no signature on the resolution and no vote on it.

And she said, "Yes, we passed a resolution on Mr.

Graham. Yes, we did, but I don't have the facts here
460 with me. I don't know that this is the resolution we passed. I can't say it at the moment."

Barry DeRose said, "Did Mr. Littell tell you that he was replacing Alexander with Mr. Graham?"

Did you have that discussion? A. No, sir.

I never remember ever mentioning Mr. Alexander's name.

Q. Did you make any suggestion that Mrs. Wauneka consult anyone with respect to the procedure leading to the Amendment No. 11? A. On two occasions I specifically told Mr. Wauneka in these words: Annie, you have a brother by the name of Tom Dodge, who is an excellent research attorney. When I was the District Attorney in Pima County, he used to visit my office and research often. And I said: Don't take my word for anything, but take this book or one like it—

Q. Referring to Defendant's Exhibit 18 for identification.

A. And ask him for some advice. Let him tell you.

Q. Now, further on page 266, there is a statement: Barry DeRose said, "Why did you employ Mr. Graham?"

Annie: "We had to have a water lawyer so he was the man we put in there because of the San Juan River deal."

Barry DeRose said, "Mr. Littell did not mention this

to the Council. It's a fraud. I have taken all the minutes of the Tribal Council sessions pertaining to Mr. Littell ever since he was appointed and you ought to see the record of Mr. Littell with John Boyden, how he really put and smeared Mr. Boyden."

Did you make those statements? A. Well, first, I have made a statement exactly contrary to that. I told the Navajos that I thought they should have a water attorney, and I never mentioned Mr. Graham's name in that conversation.

Q. Have you finished? A. I might have mentioned his name when I pointed to him being hired, but I didn't say that he shouldn't be hired, or that it was any fraud in hiring him, no.

Q. What about the statement with reference to Mr. Littell's relationship with John Boyden?

Did you have anything to say about that? A. I could have said that but I don't remember it.

Q. Now, at the top of page 267 of this reported conversation:

Barry then said, "I have a lot of other papers and notes in here, but I have another copy. I will give that to you."

Referring to the blue book.

But, he never gave it to me.

Did you ever furnish her with a copy of the blue book? A. No, I think after that visit, why, then, the animosity between the two groups got so great that we never chatted again.

Q. What two groups are you referring to? A. The members of the Chairman's Council, his group, and Annie Wauneka's group.

Q. Then the next statement: Mr. DeRose said, "Another thing Mr. Littell did and never said a word to the Council, since it doesn't show in the minutes, he went ahead and turned around and had this Hopi case registered as a claims case. All this time he has been telling the Council it is a Hopi boundary dispute. Never did he say he was going to

claim 10 per cent on it. And he isn't going to claim it, because he lost it."

Did you make those statements? A. I didn't say he isn't going to claim it, because I previously said he already claimed it.

I think I did make that statement.

Q. In substance you did make the statement? A. Yes, sir.

Q. Now, Mrs. Wauneka said, I said, "A claim case?"

And Barry said, "Yes, and you didn't know it. He is doing the same thing on this boundary dispute, and he will claim 10 per cent. This man is a millionaire, don't you know it? And he is getting 10 per cent on every dispute he is looking for."

463 Did you make those statements? A. No, not in those words.

I said he would make millions on that 10 per cent of the richest land in the Southwest, that he would make millions, that he could make millions out of it.

I didn't say he was a millionaire.

Q. Did you make any statement about Mrs. Wauneka not knowing the claim for the 10 per cent as a claims case? A. Yes, I believe I made that statement.

Q. Did she indicate, as it occurred, that she didn't know it, did not know that it was a claims case, or that as a claims case the plaintiff would receive a percentage of the recovery? A. Yes.

Q. She did? A. Yes.

Q. Now, in making the statement in the last paragraph under discussion, and the one previous to that, did you look at any minutes of meetings or Council records as indicated? A. Did I?

Q. Yes. A. Yes, I looked them up.

Q. Then you went on to say, Barry said, "I read in the minutes that a Council member brought out the 10 per cent and Mr. Littell didn't discuss it. That is a fraud."

464 Did you make that statement? A. I don't remember making that statement. I don't think it was ever brought out.

Q. Then on page 268, the second paragraph, referring to the election of Sam Billison, and his election statement:

Barry said, "Absolutely. You didn't realize that, did you?"

Referring to the fact of the statement in the first paragraph. A. Yes, I think I made that statement.

Q. And did Mrs. Wauneka say, No, she didn't realize?

A. Yes.

Q. That Mr. Littell was entitled to 10 per cent of the tribal income on every resource as a royalty? A. Yes, she did say she didn't realize that.

Q. Now, toward the lower half of page 268, the paragraph beginning: DeRose said, "Another thing, the Tribal Council has got to stop this argument. You have another battle created by Mr. Littell in the Ute boundary dispute. Do you know why? So he can get 10 per cent. You big Navajo Tribe, why do you want to get into these disputes," and so forth.

Have you read that entire paragraph? A. Yes, I have read it.

Q. Are those statements correct? Did you make them?

A. Well, the way I remember that I told Mrs. 465 Wauneka in reference to this, was that before they get into a court battle, that the Utes were Indians just like them, and why didn't they try to negotiate a settlement of this boundary dispute, instead of getting into any court battle, and if they did get into a court battle, and according to the contract amendments, that it likewise could be considered a claims case.

I further stated to them, that there is \$5 million being held, and that 10 per cent of that \$5 million would be \$500,000, if it became a court battle.

Q. I am not sure I understand which case you are referring to. A. The Ute boundary dispute.

Q. The Ute boundary dispute, that is different from the Hopi-Navajo dispute? A. Oh, yes, the contract provides that this would become a claims case.

Q. Now, Annie said: "I believe we passed a resolution on the Ute boundary case to go ahead and get it through the court."

Barry said, "Yes, you did. And it has got to be stopped. You should have settled this with the Hopis, now look what you got into. We didn't win that case."

Do you know what resolution was being referred to by Mrs. Wauneka? A. Yes, I believe it was a resolution requesting Congress to pass an Act so that they could, so that the Utes and the Navajos could go to court.

Q. Now, at the bottom of page 269, Mrs. Wauneka said: The only thing I kept on saying right along about the attorney contracts was, "If there were irregularities, Mr. Barry DeRose, which I hope there aren't, why didn't the Bureau of Indian Affairs do something. Why did the BIA approve those contracts all along the line, from the highest level right down to the lowest level. If they were wrong, why did they do it?"

Did she make that statement to you? A. Yes, she did make the statement, but I told her this: That Mr. Littell wasn't from the bottom to the top, that Mr. Littell took his contract from Window Rock and went straight to the Commissioner, or to the Central Office for approval, that he didn't go through the regular channels.

Q. Did you make the statement at the bottom of the page, that these BIA boys are as much in the wrong as Mr. Littell?

And again on page 270, Mr. DeRose said, "See, the Bureau of Indian Affairs boys are as much in the wrong as Mr. Littell. These letters are on file"? A. No, I told her I thought that whoever approved that goofed.

Q. Now, further down on page 270, Barry DeRose said, "They knew it was wrong, but they went ahead and

467 signed because of this political reason that I am telling you about."

Now, what are you referring to there? What was signed? The amendments? A. On November the 15th, I told her this, 1963, Mr. Stevens, the then Solicitor, had given an opinion that under no stretch of the imagination could these be considered claims cases.

Q. These, referring to what? A. Hearing vs. Jones, and Navajos vs. the State of Utah.

I said that it was very peculiar that on January the 19th, 1961, the day before the new Administration took over, he changed his mind, and wrote another decision.

Q. Now, that is the political reason you were referring to? A. That is right.

Q. And then at the bottom of the page, Mr. DeRose said, "This was never, never across the desk of Mr. Landbloom. This was handled directly between Mr. Littell and the high level Interior Department."

Did you make that statement? A. Yes, sir.

Q. Now, on page 271, there is a reference to Mr. Nakai, and Mr. DeRose said: "He—referring to Nakai—is not going to be there. I will make arrangements that Mr. Nakai is going to Washington and you will see it in the headlines."

468 Did you say that? A. I didn't say it would be in the headlines, but he was going to Washington.

Q. Did you say for what reason? Did you discuss the reason? A. I probably did, but I can't remember whether I did or not.

Q. You don't recall? A. I don't recall.

Q. Then on page 272, beginning with the fourth paragraph: Then I said to Barry, "Why is Raymond Nakai a coward? Here was Norman Littell standing on the speaker's stand three whole days talking about his work. The last thing was the budget came up, and why was Mr. Nakai just sitting there? He sat there like a cat watching a mouse. He is a coward. If he is man enough, if these things here can

be true, why didn't Raymond Nakai get up and say, 'Now look, Mr. Littell, you know what you did, 1, you committed fraud, and 2, you did this, and so on down the line.' Why didn't he outline these things? He could have knocked down Mr. Littell right there if they were true."

Did Mrs. Wauneka say that to you? A. I think she did.

Q. And did you respond as reported: He was just making a study. I also have been gathering up materials.
469 Now I have it here? A. I think I made that statement in answer, yes.

Q. Then there is apparently something omitted from the report of this conversation, because the next sentence or paragraph begins in the middle of a sentence, and it continues: all this time, he was talking against Mr. Littell.

Would that be you that was talking against Mr. Littell?
A. Yes, I presume so.

Q. And it continues: He ought to know about these irregularities, then he goes ahead and says he will cooperate.

Well, that could have been Mr. Nakai, couldn't it? A. It could have been.

Q. And it continues: Why did he say that? That man is a coward. He doesn't have the guts to get up and talk. He didn't even get up and ask one little question. I don't understand it. What's going on?

Then there is your answer: Barry said, "I will assure you that Norman Littell will be out when we go to Washington."

Did you say that? A. No, sir.

Q. Did you say anything similar to that? Or what did you say? A. I think I told her that we were going to present these facts to the Secretary of the Interior, and that
470 he possibly would take some action, but I didn't say he would be out.

Q. Then the next sentence: The Secretary of the Interior knows about these things.

Did you say that to Mrs. Wauneka? A. I might have said that.

Q. Did you also continue and say: I know where the Secretary is. He is not in his office. I know where he is, where

I can contact him just like that, he is looking for this one, pointing to his book. We are going back to Washington as fast as we know how. We being Barry DeRose and Raymond Nakai and his crew.

Is that correct, the statement? A. I think that is true.

Q. Did you know where to find the Secretary, just like that, at that time? A. No, not that part. I can't remember whether I had, someone had made arrangements, or what.

But we also discussed fully in this conversation about the housing authority, and I notice I made a little note on this book, in which Annie had requested that she be appointed the Assistant Director of the housing, that she was interested in elderly people, and would like that job.

And we discussed the housing ordinance.

Q. After that conversation with Mrs. Wauneka,
471 then Mr. DeRose, did you make a trip to Washington? A. I did.

Q. About when was that? A. Oh, June 14th, 15th, 1963, or somewhere in there.

Q. And who accompanied you, if you can tell us? A. Frank Luther, Leo Denetsoni, and Raymond Nakai.

Q. And who did you meet with in Washington? A. Secretary Udall and with Frank Barry.

Q. Was Frank Barry and the Secretary at the same conference? A. I am not sure, but I think that Mr. Barry was there.

Q. And this is approximately when? A. About the middle of June, 1963.

Q. And what was the subject of your discussion? A. We discussed this Amendment 11 with the Secretary, and also this question of the Solicitor changing his opinion as to the Healing vs. Jones and the Utah State case.

Q. Did anybody of the group that accompanied you request the Secretary to take any action? A. Yes, I believe they did.

Q. What did they request him to do? A. They asked him to investigate it and to help them out.

Q. Did they explain how they would like to be helped out? A. I think they wanted the Secretary to fire Mr.

Littell, I am not sure.

472 Q. They asked the Secretary to terminate Mr. Littell's contract? Is that what you are saying? A. I think they did. I can't remember for sure.

Q. Do you recall what the Secretary told them at this conference, or you, and your group? A. I have been trying to refresh my memory on this. It is my belief that the Secretary said, Go back and prepare a memorandum and get the Advisory Committee to pass a resolution, and put your facts down, and also to confer with Mr. Barry and whether these facts were claims cases or not, and we did later that day confer with Frank Barry.

Q. Now, during this conference with the Secretary and Mr. Barry, did anyone discuss Paragraph 12 of Mr. Littell's 1957 contract, which provides in substance that it may be terminated under 60 days' notice by the Tribal Council? A. I don't remember that being discussed.

Q. No one brought that up? A. Oh, they could have brought it up, but I just can't remember whether it was or not.

Q. Did the Secretary and Mr. Barry at that meeting make any suggestion that the tribal authorities take the matter up with the Tribal Council or with the Advisory Committee, if you can recall? A. I believe that was discussed.

Q. Can you tell us any further details about that
473 discussion? A. Well, I believe that the Secretary asked if they had brought it up before the Council, or would bring it up before the Council, and it was maybe even I said, since I made the statement before, that Raymond Nakai wouldn't have a chance against Mr. Littell, who is quite an orator, and that he would just—he had a majority of the Council mesmerized, and that Raymond wouldn't have a chance to go before the Council in any kind of debate with Norman Littell.

Q. During your visit to Washington at this time, did you confer with Mr. Schifter and Mr. Wurtzel? A. Yes, sir. In

fact, I think Dick Schifter was at that meeting with the Secretary.

Q. In regard to the termination of Mr. Littell's contract?

A. Yes, sir.

Q. Did you have any other conversations with Schifter, Wurtzel, or anybody else, other than those you have mentioned? A. Oh, yes.

Q. Will you tell us about that, relating to the subject matter? A. Well, the press was asking Raymond to make a statement, and we had a press conference, or he did, and I was there as well as Dick Schifter, but other than those, I don't believe we talked with anyone else.

474 Mr. Pittle: I have no further questions, Your Honor.

Cross Examination

By Mr. Wiener:

Q. Mr. DeRose, these complaints and allegations of shocking conduct concerning Mr. Littell that you discussed with Messrs. Nakai, Damon, Mr. and Mrs. Denetsoni, and their group—you have in mind what I am referring to? A. Yes, sir.

Q. Did you ever bring those to the attention of Mr. Littell? A. No, I don't believe I did.

Q. Did you consider that to have been ethical? A. Yes, I believe that, because I thought the proper procedure was to go to the guardian and tell him what was happening to his wards.

Q. But you never thought it was necessary to go to the attorney whose client had complained to you? A. No.

Q. I take it, Mr. DeRose, you are a close friend of Secretary Udall? A. I am a friend.

Q. A close friend? A. Not a close friend.

Q. Not a close friend, oh.

475 I take it you consider friendship to be a two-way street, don't you? A. It might be.

Q. Well, now, if the Secretary said, and I am reading questions and answers earlier given in this proceeding, page 476.

Question: Do you know a Mr. Barry DeRose?

Answer: Yes, I do.

Question: I take it he is a warm personal and political friend of yours?

Answer: He is an old friend; yes, sir.

You would disagree with the Secretary's characterization of the friendship between the two of you?

Mr. Pittle: I object to arguing with the witness. He said he is a friend. He said he is not a close friend.

Now, counsel is asking him about an old friend. Where does this get in there?

The Court: Well, he may disagree with the Secretary's statement or he may agree with it. I don't know. This is what the Secretary said.

It is up to him to say.

The Witness: I am happy. I didn't know that the Secretary made that and that he regarded me that closely, because he has never shown it. I have only really known him real well since 1960.

476 Q. Are you on a first name's basis? A. Yes, sir.

Q. Now, on this trip to testify in this cause, Mr. DeRose, how long have you been in Washington, on this particular trip to testify here in Court today? A. I got in Thursday evening.

Q. And on that trip have you communicated with Secretary Udall? A. No, sir.

Q. Do you know Mr. Frank Barry? A. Yes, sir.

Q. How long have you known him? A. I knew him when he ran for Supreme Court Judge, before I first met him, in Arizona, and I cannot remember when that was.

Q. Well, approximately? A. I would say 8 or 10 years.

Q. And is he a friend of yours? A. I know him. He is a friend, yes, but nothing personal.

Q. Are you on first name's terms with him? A. Yes.

Q. And I take it you have a high professional regard for him? A. I certainly do.

Q. Now, these payments that you are going to receive from the Navajo Housing Authority are pursuant to
477 a contract, aren't they? A. Yes, sir.

Q. And was that contract pursuant to which you are going to be paid approved by the Secretary of the Interior? A. No, sir.

Q. I take it you are familiar with the provisions of Section 2103 of the Revised Statutes?

Mr. Pittle: I will have to enter an objection. There is no foundation to show that a contract with the Navajo Housing Authority requires either the approval of the Commissioner of Indian Affairs or the Secretary.

The Court: Well, I don't know the purpose.

Mr. Wiener: May I approach the bench?

(Thereupon, counsel approached the bench and the following occurred:)

Mr. Wiener: I don't know how much this is really worth, but it goes to credibility, because it is our position that since the Navajo Housing Authority was created by the Navajo Tribal Council, the Council cannot by creating a corporate subsidiary free itself from the provisions of R.S. 2103, which require payments by Indian tribes to lawyers to be approved by the Secretary, and declaring illegal any other contracts, and providing for recovery of the payments made, and I think it goes to credibility, be-
478 cause here is a man who has denounced the plaintiff and has called his shocking conduct, and yet he himself is to receive money illegally.

The Court: Do you object to it?

Mr. Pittle: I do. I don't think it has anything to do with credibility.

There is no reason why under the law a tribe may not form an entity which may engage assistance without the approval of the Secretary of the Interior. This is paid by

the tribal office, just like salaries for other agents and employees, but under Mr. Wiener's construction it could be argued that every single agent and employee, as well as the attorney, who worked for the tribe has to have a contract approved by the Secretary.

Mr. Wiener: We don't contend that.

The Court: Well, I have given both sides a lot of latitude. It may not be important.

Mr. Pittle: But I want to make my point.

The Court: You have made it.

All right, ask the question.

(Thereupon, counsel resumed their places in the courtroom and the following occurred:)

Mr. Wiener: Would you read the last question?

(The last question was read by the reported.)

The Witness: No, sir.

By Mr. Wiener:

Q. When you mentioned a Mr. Vern Bugge, B-u-g-g-e, where is he now? A. Deceased.

479 Q. Have you an approximate notion of when he passed away? A. Yes, sir.

Q. When? A. May 31st, 1963.

Q. When was it that you first met Mr. Raymond Nakai?
A. The first time that I met him was after his inauguration, with the Chairman of my tribe, the White Mountain Apaches, and our Superintendent, who were there to see the Commissioner.

Q. Were you present at Mr. Nakai's inauguration? A. Yes, sir.

Mr. Wiener: May I have Defendant's No. 1, please?

By Mr. Wiener:

Q. I show you Defendant's Exhibit No. 1 which is a resolution of the Advisory Committee of the Navajo Tribal Council passed on the 25th of June, 1963, and ask you whether you have seen that resolution before? A. Yes, sir.

Q. And you assisted in drafting it, didn't you? A. Yes, sir.

Q. And you conferred—with whom did you confer preliminarily to drafting it? A. I believe it was—

Mr. McKevitt: I object, Your Honor. He didn't say he drafted it.

480 Mr. Wiener: Yes, he did.

The Witness: I said I assisted.

By Mr. Wiener:

Q. With whom did you confer preliminarily to assisting in drafting it? A. I can remember when this happened. It was in the evening at the Window Rock Lodge, and Mr. Leo Denetsoni and his wife came to the lodge with the rough draft, and I dressed it up for them.

Q. And I take it that since Mr. Denetsoni was an engineer and Mrs. Denetsoni was a clerk, the present language is substantially yours; is that correct? A. Not necessarily. They had it pretty well drafted. He writes good resolutions and has had practice in this.

Q. And did this resolution, as Defendant's Exhibit 1 is now before you, reflect your views of the legal matters, your legal opinions regarding the matters that you had theretofore discussed with the Denetsonis? A. Yes, sir.

Q. So that I take it it is fair to say, to summarize, that this resolution, that is, the whereas clause, down to the Now be it resolved, the whereas clauses pretty well represent your view of the applicable law and facts? A. Yes, sir.

Q. I take it before this resolution had been drafted
481 there were previous discussions concerning its subject matter that you had with Mr. Nakai and the Denetsonis? A. Yes, yes, sir.

Q. And I take it also that the paragraph, the first resolution, the numbered resolution after the, Now therefore be it resolved, the Chairman of the Navajo Tribal Council is hereby authorized and directed to request the immediate termination of the Claims Attorney and General Counsel

contract of Norman M. Littell with the Navajo Tribe, and my question is: Had that request for termination also been discussed at the meetings that preceded the drafting of this resolution? A. Yes, sir.

Q. How far back had those discussions taken place, as nearly as you can remember? A month, perhaps, or more? That is June 25th. A. Two months.

Q. Two months before? A. Yes.

Q. Now, in all those discussions about terminating Mr. Littell's contract, had anyone within your hearing suggested a possible successor to Mr. Littell after they terminated him? A. No, sir.

Q. You mean that they were going to get rid of their General Counsel of 16 years' standing and they had no substitute candidate to put forward during all this
482 discussion about termination?

Mr. Pittle: If Your Honor please, the witness did not say that. He said it wasn't said in his hearing. I object to the form of the question.

The Court: This is in the form of a leading question.

Mr. Wiener: This is cross examination.

The Court: I understand that. What he is trying to do, obviously, is to put words in the witness' mouth.

Mr. Pittle: The witness didn't say anything like that.

The Court: He is a lawyer and he can take care of himself.

Mr. Pittle: But I have to take care of the record.

Mr. Wiener: I will reframe it.

The Court: You see, counsel, I don't agree with some attorneys, because the very purpose of cross examination is to test the truthfulness of the witness' statement.

Now, if you are trying a murder case, and the prosecutor says to the defendant on the stand, and maybe you have done it yourself as a District Attorney, but he asks: Isn't it a fact that you shot John Brown yesterday?

That doesn't make it evidence. That is a leading question. He is trying to get the defendant to say, Yes, I shot John

Brown. But the evidence in the case is what the
 483 witness said on the stand in answer to the question.

So I don't quarrel with leading questions.

Mr. Pittle: I am not trying to be picky, and I am not
 objecting to the leading, but I am objecting because of
 changing the words.

The Court: All right.

Mr. Wiener: I will reframe the question.

The Court: All right.

By Mr. Wiener:

Q. As I understand your testimony, Mr. DeRose, there
 were two months of conversation preceding this formal
 resolution, at which the question of terminating Mr. Lit-
 tell's contract as General Counsel was discussed? That is
 right, isn't it? A. It was one month. I said two, but I was
 wrong. It is one month.

Q. And during the month preceding the drafting of this
 resolution the termination of Norman Littell's contract was
 discussed? A. Yes.

Q. On numerous occasions? A. Yes, sir.

Q. With numerous people? A. Yes, sir.

Q. Now, my question to you is: During all those
 484 discussions with numerous people on numerous oc-
 casions over a period of a month with respect to
 terminating Mr. Littell, did anyone in your hearing suggest
 the name of a successor once they had successfully termi-
 nated the lawyer who had been their General Counsel for
 16 years? A. To be honest, I can't say yes or no, but I
 have the feeling and it might have been told that Dick
 Schifter would be the lawyer.

Q. Thank you.

Now, this resolution, Defendant's Exhibit No. 1, was
 drafted by you after you had returned from your trip to
 Washington; is that correct? A. Yes, sir.

Q. And was it drafted at the suggestion of someone there
 at the meeting to which you have testified with the Secre-

tary of the Interior on or about the 19th of June? A. Will you repeat that question?

Q. Was the resolution, Defendant's Exhibit 1, which is before you, and which was dated June 25, 1963, drafted as a result of a suggestion made at the preceding conference with the Secretary here in Washington on or about the 19th of June? A. Not just because of the conversation but this is a culmination of, as previously stated, of a month's confabs, and finally consummated by the discussion with the Secretary.

Q. Yes, all right. Now, my question is: Was the
485 resolution, Defendant's Exhibit No. 1, drafted as the result of a suggestion made at the conference with the Secretary? A. Not only at that suggestion.

Q. Well, was the suggestion made at this conference with the Secretary that you better have a resolution of some kind? A. Yes, sir.

Q. Who made that suggestion? A. I believe the Secretary made it.

Q. The Secretary? A. Yes.

Q. Now, did anyone at the meeting with the Secretary on or about the 19th of June, 1963, say that the resolution would have to be passed by the Tribal Council? A. I don't believe they said it would have to be passed by the Tribal Council, but I believe someone suggested they get it passed by the Tribal Council.

Q. Who said that? Who made that suggestion? A. I think the Secretary.

Q. The Secretary? A. Yes.

Q. When the Secretary suggested a resolution by the Tribal Council, what was said to him? A. I believe that was when Leo or Raymond, one of them, said that it would
be impossible to get a majority of the Tribal Council,
486 because of Mr. Littell's influence on them, to pass the resolution.

Q. And that was said to the Secretary on the 19th of June? A. To the best of my knowledge, yes.

Q. And Mr. Barry was also there at the time? A. I believe he was.

Q. Mr. DeRose, would you be good enough to look at Plaintiff's Exhibit A, which is before you, and at pages 206 and 207, there is what purports to be a report of an interview or press conference given by Chairman Nakai.

I will ask you to read over those two pages and say whether—you were present at that conference, weren't you? A. Yes, sir.

Q. Read over those two pages and tell His Honor whether that is a substantially accurate report of what Mr. Nakai said? A. Everything is true, except the statement about the amount of fees that Mr. Littell received.

Q. Did Mr. Nakai make the statements attributed to him? I am not asking whether this paragraph on page 207 is true.

My question is: Did Mr. Nakai say substantially what is in that paragraph? A. Well, he didn't say that he had received that, he said, the way I remember it, he said that his staff had received 185,000, his legal staff at Window

Rock, I believe, but he didn't say he received any 487 185,000, and no 700,000 above his retainer. He might have said that he spent this in trying lawsuits.

The Court: Do you have further questions?

Mr. Wiener: Yes, sir.

The Court: I think we will take our 15-minute recess at this time.

(Thereupon, a short recess was had.)

By Mr. Wiener:

Q. Mr. DeRose, you know, don't you, that Mr. Nakai has or at least had a radio program in the Navajo tongue? A. I heard that he had one.

Q. And that he is esteemed as a very considerable orator in the Navajo tongue? A. Yes, he has that reputation.

Q. Now, if you will turn to Defendant's No. 1, Mr. DeRose, the resolution, and on the second page turn to

paragraph 9, which reads, "The purpose of the Healing vs. Jones case is not to acquire property or compensation from the United States or its officers within the meaning of paragraph 2 (b) of the Tribal Attorney Contract."

Did that represent your opinion? A. It is my opinion, yes.

Q. And are you familiar with the first opinion of the three judge District Court in Healing against Jones
488 that is reported at 174 Federal Supplement Page 211? A. I haven't read it.

Q. You never read it? A. No.

Q. So that you don't know that in that case the United States interposed a defense of lack of jurisdiction? A. I have read that somewhere.

Q. And even though the United States interposed a defense of lack of jurisdiction, it is your opinion that the purpose of Healing vs. Jones wasn't to acquire anything from the United States? A. Yes, sir.

Q. Now, did you know that at the time you drafted Defendant's Exhibit 1 that Amendment No. 11 to Mr. Littell's attorney contract had been reviewed by Solicitor Barry before it was approved by the Assistant Secretary? A. I didn't know that.

Q. You didn't know that? A. No.

Q. Do you know it now? A. If you make the statement, I believe it.

Q. We have a stipulation on that.

Now, you referred to an opinion by Solicitor Stevens dated 19 January, 1961, as a political opinion? A. Will you repeat that, please?

489 I say, you referred, did you not, to the opinion of Solicitor Stevens dated 19 January, 1961, as a political opinion? A. Yes, sir.

Q. Did you ever read that opinion? A. Yes, sir.

Q. Did you ever see the document on which Mr. Stevens based his change of opinion? A. No, sir, I believe I just read that, read the opinion. I don't believe I ever saw the document.

Q. May I have Plaintiff's Exhibit I, please?

I show you this Exhibit I, which is the letter of Mr. Stevens to Mr. Littell, dated January 19th, 1961, and call your attention to the second sentence in the second paragraph, reading, "You have also furnished us copies of the minutes of the Advisory Committee meeting of September 24, 1957, at which the Committee authorized in behalf of the Tribe the acceptance and execution of your present contract."

And continuing, "The minutes clearly show that the negotiation of the contract of the Tribe and you specifically discussed the Hopi case, Item 66 as being a claims matter within the claims provision of your contract."

Now, my question is: Did you ever read those minutes which were the basis of the Stevens' opinion which you have here characterized in the courtroom as political? A. 490 I believe Mr. McKevitt read to me part of those minutes.

Q. But you didn't read them yourself? A. Not to my knowledge.

Q. Turning now to paragraph 12 of Defendant's Exhibit 1, on the same page, "The said Norman M. Littell did by the reading of words, at his own expense, in effect charged the Navajo Tribe for the employment of associate counsel to work on the claims case, and at the same time received compensation from the Navajo Tribe as General Counsel," and so on.

Just read it to yourself. A. Yes. I have read it.

Q. Did that represent your opinion? A. Yes.

Q. Did you know when you prepared this that Amendment 11 had been reviewed by Solicitor Barry prior to its approval by the Assistant Secretary? A. No, sir.

Q. All right, if you will turn over to page 3, Mr. DeRose: 16. He has taken credit for winning other cases, such as the Arizona-California Water Suit, in which he apparently took little or no active part.

Again, does that represent your opinion? A. I didn't

know anything about this. This was told to me by Denetsoni.

491 Q. So they didn't tell you that he attempted unsuccessfully, however, to intervene in the Arizona-California case in the Supreme Court on behalf of the Navajo Tribe? A. That he had attempted to?

Q. Yes. A. No, they just told me that he had been telling the people out there that he was the one that won the Arizona-California suit, when in fact he didn't. He didn't have anything to do with it.

Q. So that you were advised that he apparently took little or no active part, even though he had filed a motion for intervention in the Supreme Court? A. Yes, sir.

Q. Now, this entire resolution, you have testified, Defendant's Exhibit 1, was drafted following this conference with the Secretary and Mr. Barry and Mr. Nakai and the Denetsonis, and Mr. Frank Luther? That is correct, isn't it? A. Yes, in time, yes, sir.

Q. And how long did that conference take, I mean, how long were you in the Secretary's office, you and your group? A. I am just guessing, but I would say 10 to 15 minutes.

Q. So that all these matters were discussed in 10 or 15 minutes? A. Yes, sir.

Q. Now, was Mr. Schifter at this conference with
492 the Secretary? A. I believe he was. I am not sure.

Q. Was Mr. Wurtzel there? A. No sir, I don't believe he was.

Q. Did you have further conferences with either Mr. Schifter or Mr. Wurtzel during the remainder of your stay in Washington on that occasion? A. Yes, sir.

Q. With whom did you confer? A. With both Mr. Schifter and Mr. Wurtzel.

Q. And did part of the conference concern Mr. Littell's attorney contract? A. Yes, sir.

Q. Did part of the conference concern this resolution, Defendant's Exhibit 1, which was going to be drafted when you left Washington? A. That, I don't remember.

Q. Did you discuss with Mr. Schifter and Mr. Wurtzel the Secretary's reaction and Mr. Barry's reaction to the representations that had been made at the meeting you had with him? A. Oh, I believe we did, yes, sir.

Q. Now, when was your next conference? This was, as I recall, about the 19th of June.

When was your next conference, face to face, with Secretary Udall for any purpose following the 19th of June, 1963? A. I came back here in 1964. I can't remember when, the month, with my tribe, the White Mountain Apaches but there was no discussion about Mr. Littell.

Q. And that is the only time you have seen Mr. Udall? That is, this conference in 1964 on White Mountain Apache matters has been the only time that you have seen Mr. Udall between the 19th of June, 1963, and today? A. No, sir.

Q. All right, when did you see him again? A. In Phoenix, Arizona at an area conference, for the Phoenix area, within the last three months, I think.

Q. Within the last three months? A. Yes.

Q. Did you then discuss the Littell contract? A. No, sir.

Q. Well, turn if you will, Mr. DeRose, to the blue book, Plaintiff's Exhibit A, and turn to page 257, if you will.

In the last paragraph, there is reference to a meeting at the airport at Window Rock, which you said was not secret but which meeting occurred.

Do you recall that meeting? A. Yes, sir.

Q. All right, what time of day was it, and where was it, and who was there? A. First I believe I flew up in the morning—no, the afternoon, it was around 1:30 or 2:00 o'clock, I believe.

There was Nelson Damon, and a fellow by the name of Standley, and some other lawyer, but I didn't know who he was.

Q. Could that be Walter Kegel? A. Yes, I believe that is him, and Leo Denetsoni, and a couple of others. I can't remember who they were.

Q. Was Mr. Nakai one of them? A. No, sir.

Q. All right, what was the subject of the discussion? A. Nelson Damon was seeking legal help in order to assist him in his fight against Norman M. Littell.

Q. Now, when you say his fight, Mr. DeRose, do you mean his personal fight as distinguished from the fight of the Nakai faction, or was it the fight of the Nakai faction? A. The fight of the Nakai faction.

Q. So that it is fair to say that Mr. Damon was there as Mr. Nakai's Vice Chairman? A. No, sir. This was Mr. Damon's own idea and he had contacted these fellows.

Q. Who are these fellows, the other lawyers? A. Yes, the lawyers.

Q. But not the other Navajo Indians? A. No, he had contacted these two lawyers, and I believe that my reason for being there was to pass judgment on these two
495 lawyers, for Nelson Damon.

Q. And they were being considered as successors to Mr. Littell; is that it? A. That wasn't discussed as was discussed the—what was discussed was them helping the ouster of Mr. Littell.

Q. So that when Mr. Littell in his letter to the secretary referred to that as two other hopeful attorneys, that was a correct characterization, wasn't it? A. I can't say that. I don't know whether these fellows were interested in representing the Navajos.

Q. Now, let us turn again to the discussion with Mrs. Wauneka, which begins at page 262 of Plaintiff's Exhibit A.

Now, to refresh your recollection, the initial parts of that discussion were in Mr. Nakai's office, weren't they? A. One of the discussions was.

Q. And then from there you adjourned to her home? A. No.

Q. Well, take a look at—or her daughter's home? A. No, we didn't adjourn there.

Q. Well, take a look at page 264 and read the last half of the page.

Does that refresh your recollection that you left Mr. Nakai's office and called on Mrs. Wauneka at her home or her daughter's home? A. Well, I didn't, and it
496 doesn't say there. I don't see where it says that I did.

Q. All right, the second paragraph from the end: Annie: "Okay, let's get together at my daughter's house at 2:00 o'clock."

Then I left DeRose and wanted to get advice from someone so I decided to see Maurice McCabe and tell him Mr. DeRose wanted to get together with me to tell me more about these problems. I wanted to find out if it was a wise thing to do.

I immediately went to my house and after lunch telephoned to Mr. McCabe to come to my house at once, and he came to my house, and I told him about the conference coming up between myself and Barry. Maurice told me to go ahead with the conference, to listen and try to pump him. With that, he left. I waited for Barry DeRose. He said he would come up at 2:00 p.m. but he didn't come until 3:00. Meantime, Katharine, Raymond Nakai's secretary, told me Mr. DeRose couldn't be there til 3:00.

He drove up about 3:00 o'clock, and I was the only one in the house.

Now, does that refresh your recollection that after the morning conference with Mrs. Wauneka in the Chairman's office, you then went to her home in the afternoon? A. That could be, but I don't remember it being the same day.

497 Q. Now, turn to page 267, where Mrs. Wauneka reports you as saying: Barry DeRose said, "I am going to take this to the American Bar Association."

I said, "Where is the American Bar Association?"

Mr. DeRose said, "In Washington, all over the country."

I said, "Oh, isn't Mr. Littell a member of that?"

Barry DeRose said, "That doesn't mean anything, whether he is a member or not, but they will disbar him, and he shall never, never at any time be able to practice law again."

I said, "Is it going to be that bad?"

Barry DeRose said, "Absolutely. Didn't I tell you about the irregularities and these frauds. That is enough. Even the Hopi case is enough."

I will ask you whether that substantially correctly reports part of your conversation with Mrs. Wauneka? A. It does absolutely not.

Instead, I said this: That Raymond Nakai could report this to the American Bar Association, but he doesn't want to hurt Littell's reputation, he is getting up in age, and after all these years of practice, it would be a shame that this be brought, that he would have this kind of record against him.

Now, that is what I told her, not that I was going
498 to bring it up before the American Bar Association.

Maybe it should be, but I didn't do it, or I didn't say I would either.

Q. Now, did you also suggest to her that the Navajo-Hopi case should have been settled administratively? A. I said they should have attempted to negotiate a settlement.

Q. Did you know, Mr. DeRose, that the Interior Department was unable over a 60-year period to settle the Navajo-Hopi case administratively, and that a special jurisdictional bill had to be passed in order to determine the controversy? A. No.

Q. Well, so that you never read the opinion of the three judge court in 218 Federal Supplement 125 which details the 60 years of controversy? A. No, I never did.

Q. But despite the fact that you have not read that opinion, you have a very clear notion of what the Healing vs. Jones case is? A. No, sir. I just merely stated that

they should have attempted to negotiate before locking horns.

Mr. Wiener: Now, will you mark this Plaintiff's X for identification?

(The document was marked Plaintiff's Exhibit X for identification.)

499 By Mr. Wiener:

Q. Now, reading from page 18 of Plaintiff's X for identification, I will ask you whether on Monday, June 17th or possibly Tuesday, June 18th, you had another meeting with Mrs. Wauneka in the office of Walter Wolf of the Legal Department at Window Rock? A. I don't remember that meeting.

The Court: What year is that?

Mr. Wiener: 1963, Your Honor.

By Mr. Wiener:

Q. I will ask you whether that wasn't a meeting at which you and she talked about old age care and the building of housing for the aged? A. I sure don't remember that. I don't remember being in Mr. Walter Wolf's office.

Q. No; I am saying at Walter Wolf's office. A. Well, I honestly don't remember ever being there.

Q. Well, put it this way: Did you on or about the 17th or 18th of June, 1963, have a meeting with Mrs. Annie Wauneka at which you discussed housing for the aged? A. Not to my knowledge.

Q. Well, now, you testified on direct, Mr. DeRose, that you did talk about housing for the aged with Mrs. Wauneka.

You had such a meeting, didn't you? A. Yes, and I made a note on this book that I had with me at her house, and that is why it refreshed my memory that I had talked to her about housing, and she wanted to be the Assistant Director.

Q. By the way, who gave you that book, Defendant's 18 for identification? A. Mrs. Denetsoni.

Q. Did she tell you that she had taken it without her superior's permission? A. No.

Q. Now, in your conversation with Mrs. Wauneka about old age housing, did she tell you she had tried to get that kind of housing over a long period? A. She could have but I don't remember it.

Q. Did you suggest to her that she could get a job and that you would take her name to the Chairman to recommend her for the job? A. I believe I did.

Q. And you told her that you were going to have a meeting with the housing authority and you would mention her name? A. I probably said that.

Q. And you did say in substance:

Barry said: I agree, you have made the right decision. We should not bother with this until after the other thing has been constructed.

And Mrs. Wauneka said: About salary, I don't
501 know whether I should take it or not.

And you said: It don't hurt you.

Was that in substance, the conversation? A. I don't remember that.

Q. You don't remember that? A. No.

Mr. Wiener: I have no further questions, Your Honor.

Mr. Pittle: I have nothing further, Your Honor.

By the Court:

Q. Just a minute, Mr. DeRose. When was the decision made and by whom to visit the Secretary of the Interior about this matter? A. The decision was made during that week of the 19th, and it was discussed between the Chairman and myself, and we made the decision.

Q. Both of you together made it? A. Yes, sir.

Q. Was it your suggestion or his that you see the Secretary? A. It was his, I believe.

Q. His suggestion? A. Yes, sir.

Q. Now, you had only been in this case a short while; that is correct, isn't it? A. Yes, sir.

502 Q. Did you have an opportunity to give this matter serious consideration before you decided to come to Washington and see the Secretary? A. Yes, I had been on it approximately one month, and I had discussed it with, as I previously stated, with people in the Bureau, and individual Indians, and felt that it warranted investigation.

Q. Now, you said, I believe, that you got the impression, and I don't know your exact words, that Mr. Schifter's name had been mentioned as a possible successor to Mr. Littell; is that correct? A. Yes, sir.

Q. I have forgotten the language that you used, or the words. Where did you get that impression? A. Well, because he called me from Washington, and he was on the scene, and he had been on the scene for, oh, I guess two or three months, and he just kind of seemed to be directing, he was the final approving authority of anything that happened.

Q. With what? A. As far as Raymond Nakai is concerned.

Q. Well, when did he call you from Washington the first time? A. In May of 1963.

503 Q. And was he the one that recommended that you become an attorney in this matter? A. He or Mr. Bugge.

Q. He or Mr. Bugge? A. Yes, sir.

Q. How long had you known Mr. Schifter? A. I had never met him until I met him at Gallup.

Q. He was present, did you say, during the conference with the Secretary of the Interior? A. It is my belief that he was. I could be wrong there, Judge, but I think he was.

Q. Now, you said, I believe, that this whole conference took only a matter of 10 or 15 minutes with the Secretary? A. Yes, sir.

Q. You mean, you discussed all these problems in just 10 or 15 minutes with the Secretary? A. We discussed just this resolution part of it, and then the amendments

to the contract, and showed where these cases had been made claims cases.

Q. Who drew up this rough draft of the resolution that was later adopted or ratified or passed by the Advisory Committee? A. Mr. Denetsoni.

Q. He brought that to Washington with him? A. No, he didn't have it there then.

504 Q. Well, did you give paragraph 12 of the contract, of the Littell contract, any consideration, which is known as the termination part of the contract? A. Paragraph 12?

Q. Yes.

Mr. Doyle: I don't believe the witness is looking at the contract, Your Honor.

The Court: Will somebody give the witness a copy?

Mr. Doyle: It is page 46, I believe, in the blue book.

By the Court:

Q. Now, that contract reads as follows, and I will read the part of it that is pertinent:

Termination: (a) The Tribal Council may terminate this contract for good cause shown in respect to any one or all of second parties'—meaning the attorneys, I suppose—services as General Counsel after giving sixty days' notice to any of second parties in respect to which termination is sought, the said termination to become effective upon approval of the Commissioner of Indian Affairs, provided, however, that in the event of disagreement between the parties as to the sufficiency of the cause, the question shall be submitted to the Secretary of the Interior.

Now, what did that paragraph mean to you as a
505 lawyer? A. Well, it means that the Tribal Council may terminate this contract for good cause shown by giving 60 days' notice, and that the Secretary is the judge as to whether this is good cause.

Q. Well, is there anything in that contract, or was there anything when you studied it, that said in effect that the

Secretary of the Interior had the power to terminate this contract without going through the procedures set forth in paragraph 12? A. Well, if Your Honor please, I analyzed it this way, that—

Q. No, I am asking you the question: Was there anything in that contract that gave the Secretary the power to abrogate or cancel or rescind the contract before doing what paragraph 12 said must be done? A. No, sir.

Q. Did you give the Navajo Tribe any legal advice on that, your interpretation of that contract? A. No, I didn't. I gave them advice stating that in my judgment that the Secretary was akin to a guardian and ward relationship, and that if a guardian knew that his ward had been harmed, that he in this capacity had the power to do something about it.

Q. Well, now, did you know any or all of the 74 regularly elected delegates of the Tribal Council, which is the governing body? Did you know those people? A. I know about 12 of them.

Q. I take it they were regularly elected? There is no question about that? A. No question about that.

Q. And they set the policy of the Tribe; that is correct, isn't it? A. That is correct.

Q. They make the contracts or approve the contracts? A. That is correct.

Q. Now, as between that body of persons, men and women, I assume, I don't know, but I suppose there are men and women on there because Mrs. Wauneka is a member; is that correct? A. Yes.

Q. And as between this other group of about 9 men, 9 people, known as the Advisory Committee that adopted this resolution, who were appointed personally by Mr. Nakai, the new Chief, which would you say would be the body who would be more responsible or more able to properly determine whether Mr. Littell had done anything improper or not, as between those two groups? A. I would say that it would be better to have had the full Council vote on it, that part of it.

Now, who would be the most able, as I previously stated, these people do not, most of them do not
507 understand verbiage and wording of contracts, and you could explain it to 6 or 9 a lot easier than you could to 74.

Q. Well, now, was this some kind of idea or situation whereby you wanted to circumvent and get around any meeting that the Council might have on this matter and take it directly to the Secretary of the Interior? A. No, no, sir. I recommended that they take it before the Council.

Q. What was said when you recommended that? A. That Mr. Littell would be there and Raymond Nakai wouldn't have a chance.

Q. Now, you just said a while ago that he was quite an orator, that Mr. Nakai was quite an orator on radio? A. Yes, in Navajo, he is, but he is not comparable to Mr. Littell.

Q. Well, that was your opinion? A. Yes, that is my opinion.

Q. Did you feel that those 74 people would disregard what their newly elected Chief said and take anything that Mr. Littell told them to be the truth, if that situation developed at a meeting? A. I certainly do.

Q. Did the Secretary of the Interior ever suggest that this matter be first placed before the Tribal Council as indicated or specified in paragraph 12 of this contract? A. Yes, I believe he did.
508

Q. And that was not done, of course? A. No, not to my knowledge it has not, if Your Honor please. I haven't been up there for a long time.

Q. How was the appointment made with the Secretary? Did you make it yourself with him? A. I believe I did make it.

Q. Well, don't you remember? Did you write to him, or did you telephone him, or put in a telephone call or what? A. To the best of my knowledge, I believe I called Warren Beatty and asked him.

Q. Who? A. Warren Beatty.

Q. Who is he? A. He was the Secretary's secretary.

Q. Just one more question. Are you a member of the local Bar Association? A. No, sir.

Q. You know as a matter of common knowledge that your local, either State Bar Association or County Bar, have what are known as Grievance Committees to investigate the conduct of lawyers, don't you? A. Yes, sir.

Q. You have reason to believe, I take it, that
509 the American Bar Association had such a Committee?

A. Yes, sir.

Q. You knew Mr. Littell had been a lawyer for this Tribe since 1947? A. Yes, sir.

Q. And you respected your oath and your duty as a lawyer, did you not? A. Yes, sir.

Q. You thought in your own mind he had in effect cheated these people that belonged to this Tribe; correct? A. Correct.

Q. You thought he had done something that was very reprehensible and dishonest; correct? A. Correct.

Q. But notwithstanding all that information that you had that was given to you, you didn't think it was your duty as a lawyer to refer this to the D. C. Bar Association Committee on Grievances, or the American Bar Association Committee on Admissions and Grievances? A. If Your Honor please—

Q. Did you or did you not? A. I did believe it was, and I talked this over with Mr. Nakai, and Mr. Nakai did not want to do it.

Q. Now, the truth of the matter is that this is a very lucrative account, isn't it, for an attorney? A. Yes,
510 I would say it is lucrative.

Q. Now, how long have you been in Arizona? A. Forty-eight years; I was born there.

Q. Back in 1947, the Tribe, according to the evidence I heard in the contempt proceedings, was a relatively poor Tribe, and Mr. Littell was making about \$5,000 a year, I believe in those days.

Do you know of many lawyers that wanted to get that account in those days? A. Yes, sir.

Q. How many? A. I know Mr. Boyden did. He came all the way from Utah to try to get it.

Q. When did the competition become keen, if it did become keen and active, to take over this account from Mr. Littell? A. I have never known that it had become keen. I don't know if I would take it if they would offer it to me, to be honest with you.

Q. You don't think you would? A. I wouldn't move to Window Rock.

The Court: That is all.

Mr. Pittle: I have no further questions.

The Court: All right, step down.

(The witness was excused.)

510-A Mr. Pittle: I would like to call Mr. Littell, as an adverse witness, Your Honor.

The Court: Very well.

Thereupon

Norman M. Littell

the plaintiff herein, was called as a witness in his own behalf and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Pittle:

Q. You are Mr. Norman Littell, the plaintiff in this lawsuit? A. I am.

Q. And your address is Mason Beach, Maryland; is that correct? A. An apartment in Washington, D. C., at 1728 New Hampshire Avenue, and the permanent legal residence is at Mason Beach.

Q. Now, you have been General Counsel and Claims Attorney of the Navajo Tribe for a period of 17 years, as we know.

Will you tell us whether or not it is a fact that many of the hundred thousand Navajos do not speak English very fluently? A. I didn't hear all your question, 511 counsel. Would you mind repeating it?

Q. Isn't it a fact that many of the 100,000 or more Navajos do not speak English fluently? A. Yes.

Q. Is it also a fact that they do not read English or write it readily? A. That is true.

Q. The 74 members of the Navajo Tribal Council, which has been in existence as the Tribal government, consists of members from various portions of the reservation elected by the people.

Has the Tribal Council as presently constituted been in existence for the full 17 years that you have served as General Counsel? A. Yes.

Q. The 74 members? A. I believe, counsel, that there has been no change in that number. There might have been a district line change that I have forgotten, but it is substantially correct.

Q. Is it a fact that many of the 74 Council members, whoever they may be from time to time, do not readily speak English or don't speak English fluently? A. I have already said that, yes.

Q. No, I am talking about Council members now, Mr. Littell. A. Yes. How many, I do not know.

512 Q. That the proceedings in the Council meetings are frequently carried on in the Navajo language; isn't that true? A. They are carried on in two languages.

Navajo speeches are transferred or interpreted into English, and English speeches are interpreted into Navajo.

Q. And are written documents that are presented for discussion translated also? A. That is right.

Q. You yourself do not speak Navajo, do you? A. No.

Q. Now, the original contract was executed in August, 1947, and it appears beginning on page 10 of Plaintiff's Exhibit A, if you wish to refer to a copy of it in front of you, and was for a period of ten years to expire in August,

1957; isn't that correct? A. Yes, without even checking the document, I remember.

Q. Now, you were employed in a dual capacity, both as General Counsel, for which you received a fixed annual retainer, and as Claims Attorney to prosecute certain claims, for which you received a percentage of the recovery? A. That is correct.

Q. And as General Counsel you received the fixed annual retainer and were furnished certain expenses and services in addition—I am talking about the original contract now.

A. Yes.

513 Q. And as Claims Attorney you were to receive as a fee only a percentage of the recovery? A. That is right.

Q. You were to receive expenses too, however, were you not, expenses of prosecuting claims? A. That is right.

Q. Did these include compensation for employing additional attorneys to assist you on claims? A. No.

Q. Did they include office rent? A. No.

Q. Did they include the expenses for hiring expert witnesses? A. Yes.

Q. And were they limited to hiring expert witnesses in prosecuting the case, that is, in the name, in the matter of court costs? A. No; all incidental expenses, exhibits, maps, preparation, duplication, travel, and all that sort of thing, secretarial expense.

Q. Do you have any idea of approximately how much you have received and spent prosecuting claims since 1947 for the Navajos? In the neighborhood of \$800,000? A. I think 700,000 is about it, counsel, for all cases, in all times, and all field work.

514 Q. That is apart from your annual retainer, which has varied from time to time as it has been increased?

A. Yes, but I would qualify that to this extent: That sometimes the field work was for General Counsel cases as well as for claims work.

Q. But you were compensated for that? A. Not compensated.

Q. Reimbursed? A. Reimbursed. It was disbursed through an agent at Window Rock. It didn't come to me.

Q. All right, sir. Now, the original contract, that provision paragraph 12, which appears on page 27 of Plaintiff's Exhibit A, providing for termination of your 1947 contract, provides that the General Counsel, after the expiration of five years from the effective date of this contract, the Commissioner of Indian Affairs may terminate this contract in respect to second parties' services as General Counsel at the request of first party upon sixty days' notice to the other party in interest, and in such event the parties of the second part shall receive compensation on the basis of the annual retainer provided for in paragraph 4 above, prorated to the date of termination, together with such sums as may be properly due for expenses incurred prior to the date of termination; provided further, that if second parties' services as General Counsel are so terminated by request of first party, the said parties of the second part and their assigns, if any, shall have the option to terminate the contract in its entirety, subject, however, to the provisions of the second paragraph of section B.

So that after the first five years, the Commissioner of Indian Affairs may terminate this contract as General Counsel at the request of the first party—is that first party the Navajo Tribe? A. That is right.

Q. Now, when that contract was about to expire in 1957, an interim agreement was entered into, which appears on page 242 of Plaintiff's Exhibit A, I believe, was it not? A. That is right.

Q. And in substance, is it correct to say that the interim agreement merely extended the 1947 contract for a period until a new contract could be drafted, that is, it extended the 1947 contract as it may have been amended, for a period to permit the drafting of a new contract? A. Well, with

that qualification, that it was an emergency provision, it was an emergency contract.

Q. And that interim agreement was entered into pursuant to a resolution of the Navajo Tribal Council, which approved the interim agreement, and which appears at page 241? A. Yes.

Q. Now, the interim agreement was executed by 516 the Navajo Tribe of Indians by Paul Jones, Chairman, and then you as General Counsel, Laurence Davis, Alexander, and Huerta, who were then assistants General Counsel.

Was it ever approved by the Commissioner of Indian Affairs or the Secretary? A. No, counsel. A more practicable solution was suggested by the Commissioner and was in fact followed, or am I replying—

Q. Go ahead and tell us what it was. A. Well, may I also preface—

Q. What was the practical solution? A. May I also preface this with a statement how this came to be adopted?

Q. Sure. A. We came up to the end of July, nearing August the 7th, and the Council meeting at Window Rock, and suddenly some of the members came to me and asked about the contract, and suddenly realized that my contract was expiring August the 7th.

And I said: That is correct, it is expiring August 7th.

And what were they going to do about that, why didn't they have no contract suggested?

I said: This is for you to suggest; I would not remind you of the fact. You know that there is a contract for ten years which expires August 7th, and it is not for 517 me to suggest that you renew it.

Q. If I understand you correctly—if I may interrupt—you are telling the Commissioner of Indian Affairs that it is not for you to suggest it to the Commissioner or to the Tribal Council? A. Mr. Pittle, I told members of the Council this, when they expressed great concern of the termination of the contract.

As a matter of ordinary professional delicacy, I had not mentioned it, and we were then up to the matter of two or three days of expiration when this was discovered.

Then they asked me immediately to write this interim agreement, and for the purpose of continuing for a year, subject to alterations and amendments which experience had found to be necessary, of which there were several to be considered.

You will find in the document to which you refer, namely, the interim contract itself, a complete delegation of authority to the Council, I mean, to the Advisory Committee, which was then a seasoned and experienced Committee, to go into this whole matter and to settle a final contract.

Q. All right, sir. Now, up until just two or three days before this ten-year contract was to expire, you made no mention of this to the members of the Tribal Council? A. I can't remember how many days, but it was a matter of absolute days, it was a matter of days.

Q. And then I take it had they said nothing to you
518 about renewing, you would have suddenly walked away? A. I beg your pardon?

Q. Would you have simply walked away as General Counsel? A. I would, indeed; I would, indeed.

Q. All right, sir. A. There were enough of them that knew it, Mr. Pittle, that knew, and it simply hit them with surprise that they hadn't thought about it or done something about it.

Q. Do you know of any reason why they were unaware that the contract was going to expire, that the ten-year period had run? A. Mr. Pittle, it is difficult to describe to a stranger, these Council meetings, the complete preoccupation with the absorbing Navajo Council matters, and the matters that vitally interest the Navajo people, up to the point when a problem really comes and focuses on their attention. This is a difficult thing.

Q. All right. Again I ask you whether the interim agreement, which extended the 1947 contract, and if I understood

you correctly, was not approved by the Commissioner of Indian Affairs or the Secretary? A. He came back with another suggestion—

Q. First tell me, was it approved or not, and then go ahead and give your answer. A. No.

519 Q. It was not? Now, you may explain. A. And they also told me this orally later, as long as there was going to be another contract submitted, pursuant to this resolution and this interim agreement, they didn't want to go through the laborious business of examining this contract and approving it, and having to do it all over again.

So what the Commissioner did was to extend the contract for a year. And administratively this was a simple solution. Whether he had the power or not, I do not know, but he did it, and everybody accepted it, and everybody was content with it, and then we could at our leisure, or when time permitted, get into a discussion of the details of the final contract.

Q. Now, you say they, being the Bureau of Indian Affairs officials, or the Secretary, didn't want to go through the laborious processes of approving that interim agreement, is that what you just said? A. That's what I said.

Q. The interim agreement— A. Because they would have to do it all over again, when they got it finally.

Q. What do you mean by the laborious process, to use your words? A. Well, counsel, I have been through it so many times with amendments, and the examination by, in those days it was Jim Dwight, and whoever else
520 was associated with him, and one of the gentlemen that is sitting in the back of this courtroom, who later had a lot to do with these functions, and how many hands it passed through, I don't know, but they had to examine these contracts, at least they did so, and it was quite a process.

Q. The interim agreement, which begins on page 242, is exactly 1, 2, 3 and a fraction pages long.

Did you consider that would be a laborious process to have that approved? A. No, sir, I certainly did not. That is not my idea at all, or I would not have bothered to draft it.

Q. That is what you were told by whom, the Commissioner or the Solicitor? A. I can't remember who it was who said this, but it is an obvious fact, that this is the interim agreement, and the Commissioner sought the shorter course, probably not the Commissioner but his lawyer, sought the shorter course, saying, Well, since you are going to draft the final one, let's just extend the old one for a year, which was perfectly acceptable to everybody.

Q. Now, is it correct, as I asked you before, but now I am not sure, so I will ask you again: Is it correct to say in general that the interim agreement merely was intended to extend the 1947 contract as amended for a period until a new contract could be drafted? A. No, it was
521 not. It was, if I get the refinement of your meaning, it was intended to give an opportunity to re-draft the agreement with any amendments that all parties deemed appropriate.

Q. I thought that is what I said. A. Well, if you did, then I agree with you.

The Court: I will suspend here if you like.

Mr. Pittle: Well, I was about to go into another line of inquiry and perhaps it would be a good time.

Mr. Wiener: I take it, Your Honor, there is no objection to our communicating with our client over night.

The Court: Well, he is a party to the case. I don't see that there is any.

Mr. Wiener: He is not a witness.

The Court: No. I mean, for instance, if Mr. Udall were here, I certainly would not have any objection to Mr. Udall talking to counsel about anything. He is a party to the case.

I think it is a little different when witnesses are on the stand and they are excused to come back. And even parties

I don't think that you ought to talk too much about what they are going to testify about, or anything like that.

Mr. Pittle: In a situation like this, if Your Honor please, it is a little bit unusual. We have three or four parties.

While Mr. Udall is the nominal party who made 522-560 the decisions, as you know, it is the subordinates who had the firsthand knowledge of the recommendations.

The Court: Well, let me say this to Mr. Littell. Mr. Littell is a lawyer. I would suggest that you not talk to anybody about your testimony.

I have asked the other witnesses not to, and I will ask you, too.

The Witness: Very well, Your Honor.

The Court: Talk to them about anything else.

The Witness: Except my lawyers?

The Court: I mean, I wouldn't talk to them about what you are going to testify to here tomorrow.

The Witness: Very well.

The Court: If you go out to dinner with them or something like that, that is what I mean, I am talking about going over your testimony with them.

The Witness: Very well, Your Honor.

The Court: I think you are apparently very well acquainted with the situation.

All right, we will adjourn now.

(Thereupon, at 4:00 o'clock p.m., an adjournment was taken until 10:00 o'clock a.m., on Thursday, February 4, 1965.)

* * * * *

561 Washington, D. C. Thursday, February 4, 1965.

* * * * *

562 P R O C E E D I N G S

Mr. Pittle: May it please the Court, I am informed Secretary Udall will be leaving town late this afternoon,

and I am not sure of his return. But in order to avoid what we might consider an awkward situation we would like permission to call him out of turn, and withdraw the witness that may be on the stand at 1:45 this afternoon.

Mr. Wiener: May we approach the bench, Your Honor?

(There was a conference at the bench which was not reported at the direction of Court and counsel, and after which the following occurred:)

The Court: All right, let us proceed.

Mr. Pittle: May it please Your Honor, I also respectfully request that Mr. Frank Barry, the Solicitor, be permitted to sit in Court and hear the remainder of the testimony. Although he will be a witness, he is in effect a defendant in the case, since many of the decisions were made upon his recommendation and on his own research.

The Court: Well, here is the situation. As far as the case is concerned, the only parties to this case are Mr. Littell and Mr. Udall. The other persons I consider to be witnesses in the case, not formal parties to the case. They may have an interest in the case.

I have made it a practice, particularly when counsel request it, to exclude all witnesses, except the parties
563 to the case.

Mr. Udall had a right to come down here and sit here during the trial, but he is probably too busy to do it.

Mr. Pittle: It is not that. While he made the decisions, the basic work was done by Mr. Barry.

The Court: I think we better just keep all the witnesses out in the witness room.

Mr. Pittle: All right, Your Honor.

Mr. Littell, will you resume the stand, please?

Thereupon

Norman M. Littell

resumed the witness stand pursuant to the adjournment and testified further as follows:

Direct Examination (resumed)

By Mr. Pittle:

Q. Mr. Littell, yesterday as we recessed, I was asking you about your 1947 contract, which we note provided for a ten-year term, which expired August, 1957, and you told us, I believe on the same day, an interim agreement was executed which extended that contract for ten years. That is at page 244 of Plaintiff's Exhibit 1. A. 242, I believe, counsel.

Q. 242, yes, and the interim agreement, however, was not approved by either the Secretary of the Interior or the Commissioner of Indian Affairs.

564 In any event, in 1957, a new contract was executed by you and the Navajo Tribe; is that correct? A.

Yes.

Q. And that contract is your present contract which expires on August 7, 1967? A. Yes.

Q. And that is the contract which was aproved by the Secretary and the Commissioner of Indian Affairs? A. Yes.

Q. When were you Assistant Attorney General in charge of the Lands Division, Mr. Littell? A. From April, 1939, to November 30th, 1944.

Q. And as such you became familiar with matters of Federal and Indian law, did you not? A. Well, a confession is involved, that the Indian litigation during these war years, or preparation for the war, was left very largely to the Trial Section under Robert Monroney, and the answer to your question is, yes, with that very great qualification, because I was giving my priority of attention to reforming and revising the methods of land acquisition

procedure, both through condemnation and through direct purchase, in which we had the responsibility for giving opinions to the Attorney General on title.

Q. Yes, and now you have represented the Navajo Indian Tribe for the past 17 years.

565 Do you consider that you became familiar with matters of Indian law during the past 17 years, Mr. Littell? A. Oh, I think generally speaking, as much as anyone does. You never know it all in any branch of law.

Q. Have you also represented any other Indian Tribes during the past 17 years? A. For a short time I represented a group of Indians called the Mission Indians of Southern California.

Q. The Avacalente Band? A. I believe that was one of the bands. There was a group, quite a group of those bands who came to me and asked if I would not represent them, as I was the Navajos, which I first declined, and finally they persuaded me to do it, and I did.

Q. Did you have a contract with them, Mr. Littell? A. I had a contract.

Q. And how long a term was that contract with the Mission Indians? A. I can't remember, this line of inquiry being utterly unexpected. I could easily refresh my memory but I think it is parallel to the Navajo contract.

Q. Was it for ten years also? A. I believe it was, but don't hold me to this until I look it up again.

Q. How long did you serve under that contract? 566 A. I can't remember the date that I resigned, after having filed their claims for them, and gotten it well on the road, and indeed the substantial stipulation, as between this group and other California Indian interests, represented by the Wilkinson firm, and then I turned the entire business over to some young attorneys in San Diego who were interested in it.

Q. But you don't remember for certain whether that contract was for ten years and you don't remember exactly how long you served on it; is that correct? A. No, but

I can easily ascertain those dates if my counsel will be kind enough to put down those questions. I can't keep those all in mind.

Q. You and your counsel may take it up on his examination, Mr. Littell. A. Very well.

Q. I now ask you this, Mr. Littell: Do you know of any other Indian tribal attorney contract in which an Indian Tribe has retained an attorney for a ten-year period? A. Well, I certainly am not an authority on these contracts. They were never made available to me. They are in the Department of the Interior.

Q. They are matters of public information, aren't they? They are public papers?

The Court: I think the question is whether you know of any other contract whereby a tribe of Indians
567 retained a lawyer for ten years. Is that the question?

Mr. Pittle: That is correct, Your Honor.

His answer is apparently no, he doesn't know.

Is that right?

The Witness: This is correct; I just don't know anything about them.

By Mr. Pittle:

Q. Do you know of any other Indian tribal attorney contract under which the same attorney has been retained as both General Counsel and Claims Attorney in the very same contract? A. Well, again I must make a similar answer.

Q. You don't know? A. The contract was given to me by the Bureau, and I assumed it was a standard form.

Q. The form of the 1947 contract? A. Yes, given to me by the Bureau of Indian Affairs.

Q. Including the provision for the ten-year retainer? A. Yes, it certainly was.

Q. Including the provision for the appointment of you as both Claims Attorney and General Counsel? A. Mr. Pittle, I cannot remember all the details of the discussion,

but I had never seen an Indian attorney contract at that time, and I took what they gave me, and then we argued about some of the terms.

568 Q. All right. Now, I ask you right now, isn't it a fact that one of the terms that you inserted yourself, after negotiation with the Tribe, was your retention for a period of ten years? A. To the best of my recollection, this had been agreed upon with the Chairman of the Navajo Tribal Council, who negotiated it.

Q. Yes, and that was agreed on with the Chairman of the Tribal Council? Is that correct? A. Mr. Pittle, I honestly cannot remember the history of that provision. It was approved by the Bureau of Indian Affairs, and in the discussions with them, and I don't know where it came from, whether it was in the original form, or whether I suggested it.

I certainly would have been for it or I would not have signed it. I definitely was, because you have to have stability of relationship and continuity in legal work.

Q. Yes, I understand your reasons.

What I am interested in is asking for information, and you had told me that the Bureau of Indian Affairs inserted the ten-year provisions in the form which they furnished to you.

Now, I am asking you again, Mr. Littell, to recollect whether the ten years is not something that you negotiated with the Tribal Chairman, as you just said? A. I
569 didn't say that the Bureau inserted it. I said they gave me a form, and to the best of my recollection it was there.

If it wasn't, then it wasn't. That is a matter of going back to the history at the time.

Q. I am trying to prove it through your recollection. A. Sir?

Q. Mr. Littell, I am not here to argue with you. A. I can't give you a yes or no answer when I don't remember.

And the best of my recollection, sir, was—and I am not trying to argue with you, counsel—the best of my

recollection was that this was in it, but if it wasn't, then maybe I did put it in, I don't know.

Q. All right, let's go to the 1957 contract. When the 1947 contract expired in August of 1957 we know you had this interim agreement which extended it for the purpose of permitting you to negotiate a new contract, and we know you negotiated a new contract.

Now, I ask you in negotiating your 1957 contract, the Bureau of Indian Affairs didn't insert any ten-year term in that contract for you, did they? A. No. They had plenty of chance to do it.

Q. That was a matter which you negotiated with the Tribal Council and the Navajo Tribe, wasn't it? A. The Advisory Committee.

570 Q. As well as the matter of your compensation?

A. Yes.

Q. And you also negotiated the provision which continued your retainer as both General Counsel and Claims Attorney? A. With the Navajo Superintendent present at these negotiations.

Q. And of course, we know the contract was approved? A. We do, indeed.

The Court: Let me follow you. When you say we know the contract was approved, I assume you mean by the Bureau of Indian Affairs?

Mr. Pittle: By the Bureau of Indian Affairs and the Secretary of the Interior.

By Mr. Pittle:

Q. But you in fact drafted this contract after you negotiated it with the Indian tribe, did you not, Mr. Littell?

A. After I negotiated it, I drafted a rough draft, and then negotiated as you do with any other contract, and the exhibits in this case will show, I am pretty sure, when you refer to them, when the occasion arises with the Superintendent of the Navajo Agency present and from time to time others of the Bureau.

Q. Now, I call your attention to your statement in an affidavit in Plaintiff's Exhibit A, beginning on page 10.

This is the affidavit which you filed in support of
571 your motion for a preliminary injunction, is it not?

It is page 10, sir. A. Page 10?

Q. Yes. A. Yes, that is my affidavit that I filed.

Q. Now, I call your attention to the statement in the middle paragraph, the fifth line or fourth line from the bottom, where it is stated: That the 1947 contract was renewed and extended "In almost identical form for an additional ten years."

Have you noted that statement? A. Yes, I found it.

Q. Now, I call your attention to the statement in the second full paragraph on page 11 of Plaintiff's Exhibit A, where you state that the contract set forth as Exhibit 1, being the 1957 contract, was in all principal respects in the form suggested by the Office of the Commissioner of Indian Affairs with a few modifications or revisions suggested during negotiations between you and the staff in the Commissioner's office.

Now, do you note that statement? A. I just want to read it, counsel.

It is the last line of the second paragraph on page 11?

Q. It is the first sentence of the second paragraph
572 on page 11. A. Yes. Let me see? Is this talking about the '47 contract?

Q. No, you are talking, as I understand it, about your 1957 contract—you are talking about the 1947 contract on the top of page 11; is that correct? A. Well, I just want to make sure that I am. That is what I think. But I have to refresh my recollection.

That is correct, the '47 contract.

Did you think I was talking about the '57 contract?

Q. That is what I want to ask you.

In your statement on page 10 that I read first, you say, said contract. Now, the said contract refers to the 1947 contract, which was for a ten-year period, and which was renewed and extended.

And now you are talking about the 1957 contract, are you not? A. Well, I may have left an ambiguity here unintentionally. Let me see if I did. I wasn't aware of it, counsel.

Q. Read the remainder of the sentence, and I think it will become clear that you are speaking of the fact that the 1947 contract was renewed and extended in almost identical form for an additional ten years by contract approved by the Deputy Commissioner of Indian Affairs— A. Yes, I can read it. If you just let me read it a minute, counsel,

I can recapture my thought and see if I have committed any ambiguity here.

Then the following line: See copies of said contract of August 8, 1947, and August 8, 1957, attached hereto respectively as Exhibits 1 and 2.

Clearly the line you referred to on page 11, the antecedent of that, while it could have been less—well, it certainly could have been removed, and I said specifically, this clearly applies to the '47 contract, which is also a part, and I am referring to Exhibit 1—oh, yes, I am referring to Exhibit 1.

Q. Yes, on page 11.

Now, on page 10, aren't you stating in so many words that your 1947 contract, Exhibit 1, was renewed and extended for a ten-year term almost identical of form? A. Yes, this is correct.

Q. This is what you mean to say, that your ten-year contract expired in 1957 and was renewed and extended in almost identical form? A. This is substantially correct. If you read the contract line for line you would have in essence the claims provision, the same General Counsel duties, and there are changes over the years, yes.

Q. Now, that is what you really mean? That those are almost identical? A. Well, counsel, I am perfectly aware of the changes. There was no occasion in this affidavit to delineate those differences. I usually can.

Q. I am not asking you whether there was any occasion in the affidavit to delineate the changes, Mr. Littell.

I am asking you this question: Did you mean to leave the inference that the '57 contract was not substantially different from your 1947 contract? A. It had two or three very important changes within the framework of the tribal relationship with the attorney.

I will be happy to point them out to you.

Q. You didn't find it necessary to point that out in your affidavit on page 10 of Plaintiff's Exhibit A, though? A. No, I didn't think it was within the scope of the affidavit, particularly when my counsel was pressing me for brevity, brevity, brevity.

I could have written an affidavit 20 times this long.

Q. All right, in August, 1957, when your '47 contract expired, you were then receiving compensation as General Counsel of \$15,000 a year; is that correct? A. Yes, as I remember it.

Q. Well, I call your attention to page 12 of your affidavit, Plaintiff's Exhibit 1—

The Court: Let me get something straight. I think you said the August, 1947 contract had expired?

575 Mr. Pittle: That is correct.

The Court: Isn't that the first time he was retained by them, in 1947, or am I wrong about that?

The Witness: That is correct.

The Court: At the top of page 11 it states: Prior to August 8, 1947, the Navajo Tribe of Indians had never employed counsel.

Mr. Pittle: That is right.

The Court: Nor had affiant ever been retained by an Indian Tribe.

Mr. Pittle: That is right. The 1947 contract is the first contract and it expired in 1957 and it was extended by an interim agreement.

The Court: I follow you now. I just wanted to be sure that was the first contract.

By Mr. Pittle:

Q. Now, your 1947 contract originally provided for compensation at the rate of \$7,500 per annum as General Counsel, as you set forth on page 12 of your affidavit, in Plaintiff's Exhibit 1; is that correct? A. That is correct.

Q. And by the time the 1947 contract expired in August, 1957, you were then receiving \$15,000 per annum having received increases during the interim; is that right? A.

I believe that is correct. I will check my list here.

576 Q. Well, you can look at your exhibit. A. Yes, if that is what the affidavit says, that is it.

Q. Then your 1957 contract increased your compensation from \$15,000 to \$25,000 per annum? A. Yes.

Q. Now, I would like to call your attention to the termination provisions of your 1947 contract, Mr. Littell, which you will find on page 27 of Plaintiff's Exhibit A, being entitled,

12, Termination.

Your 1947 contract—and you tell me if I am wrong—provided that after the expiration of five years from the effective date of the contract, and that was August, 1947, the Commissioner of Indian Affairs may terminate this contract in respect to second parties' services as General Counsel at the request of first party upon sixty days' notice to the other party in interest, and so forth.

Now, paragraph 3 of your 1947 contract, beginning on page 23 of Plaintiff's Exhibit A, provides that the said attorneys shall perform the duties required of them under this contract upon the request and at the direction of a Committee of the Navajo Tribal Council to be selected by the Council for this purpose. The said Committee shall consist of two members including the Chairman of the

577 Tribal Council who shall serve as Chairman of the Committee and issue all instructions to the General Counsel.

Now, I ask you this question: Under the 1947 contract do I understand correctly that the two-member Navajo

Tribal Council Committee could have requested your termination by the Commissioner of Indian Affairs? A. I don't believe so.

Q. That is not what it says? A. Mr. Pittle, I don't believe so. If you will permit me to make a complete answer, it never existed, the Committee never existed.

Q. You never had the two-man Committee? A. No, this was one of the problems we had to correct. There was no Committee ever appointed.

Q. So under the termination provisions in your original contract, what would be the mechanics for terminating the contract, if it had not been permitted to run for the full period? A. Well, it is one of the things that is a little bit vague. Any time the Council requested it, that would have been termination.

I would even have supposed the Advisory Committee could request the Council to act, but the fact is, if you wish the complete explanation, that you have two points here.

You have the termination point and you have the
578 question of who deals with the attorney, and let us take the last one first.

Take the second point first, who deals with the attorney. A Committee of three, consisting of the Chairman and two others, and they were never appointed.

Q. Why were they never appointed? A. I have no idea. I wanted to have a broader Committee, I mean, I wanted the contract to be carried forward in that effect but they never did it.

Q. All right. Now, I call your attention to page 27, the provision under 12 (b) of Plaintiff's Exhibit A, which provides that this contract, in its entirety, may be terminated by the Commissioner of Indian Affairs with the consent of the aforesaid Navajo Tribal Council Committee referred to in paragraph 3 above—and that is the Committee you tell us was never formed? A. It never existed, and this was one of the awkward parts of the earlier arrangement, that you learn from experience and that you cannot correct these things until you get a chance.

Q. What would it have required to bring that Committee into existence at that time, Mr. Littell? A. I suppose if the Chairman had appointed them.

Q. All right, then. A. But he never did. May I, 579 counsel, and I don't wish to volunteer beyond the question.

Q. I wish you would not, and if there is any further question—

The Court: Mr. Littell, in order to get this testimony in sequence and chronological order, I would suggest that Mr. Pittle examine you, and as you know, you are being examined as an adverse witness under 43 (b) of the Rules of Civil Procedure, and anything your counsel wants to develop, he may develop on cross examination.

The Witness: Yes, sir.

Mr. Pittle: Thank you, Your Honor.

By Mr. Pittle:

Q. Mr. Littell, your 1947 contract contained no provisions whatever for increases in compensation, did it?

Did you hear my question? A. Yes; no, it did not.

Q. And your 1957 contract, and I refer to page 40 of Plaintiff's Exhibit A provides in the third paragraph from the top, and that would be Section 4 (a), the last paragraph of Section 4 (a)— A. Where?

Q. On page 40 of Plaintiff's Exhibit A, which provides that from and after the approval of this agreement by the Commissioner of Indian Affairs, the compensation of the attorneys for General Counsel services may be in- 580 creased by providing in the Tribal budget for any such increase, provided however, that any such increase in compensation shall not take effect until such time as the Tribal budget has been approved by the Tribal Council and the Commissioner of Indian Affairs, provided further, that there shall be no change in the compensation of Mr. Littell and Mr. Alexander during the first five years of this contract.

Now, that is a substantial difference between your 1947 contract and the 1957 contract, is it not? A. Not really. On the first point, you again have two points, not really because it merely rendered more efficient the method of dealing with attorney compensation, which was constantly a necessity to keep any legal staff at Window Rock, and we had to go through the long process of amendments in each and every case, which was tedious.

Q. Under your '47 contract? A. Yes, under both of them.

Q. Your process of amendment? Now, what was that process? A. Well, the Council would vote it. It would be suggested in Tribal budget proceedings, and the Council would vote it, and an amendment would be made, and then it went through the tedious process of going through the Superintendent, the Area office, and the main office in

Washington, and through the whole battery of attorneys and so forth in connection with it, and this was—

Q. And that was under the '47 contract?

Mr. Wiener: If the Court please, I think he should be permitted to answer.

Mr. Pittle: I thought he had.

The Court: Well, both of you are attorneys of a great many years of experience. I will ask the witness to listen to your question, and then the witness may give any answer he wishes to, and let him complete his answer, and in that way it will be easier for the reporter to report the matter, and there will be a better record.

The Witness: This change, counsel, completing my answer as rapidly as I can is the same in substance, except that you don't have to go through this tedious process of amendment. If the Council approves it like any other salary increase or any other appointment in this rapidly expanding and dynamic Tribal organization, that goes through as an incident of the Tribal budget, and then goes through to Washington, and has the same process, and where this is felt proper was, the boys in the Department

of the Interior told me they could not keep track of the Tribal budgets, and could I get it out of there, and I said, Yes, and then under amendment I will remove it, if it is inconvenient for you, and I suggested to the Council that they remove it.

By Mr. Pittle:

582 Q. You are talking about your 1947 contract? A.
I am now talking about the 1957 change which you read.

Q. Well, let me get my understanding of your answer. You have got me confused, and it is my own fault I am sure.

In your 1947 contract, there was no specific provision for increasing compensation as General Counsel, was there?

A. I said, no, except as is implicit in any contract, you amend it as you see fit.

Q. How did your 1947 contract have to be amended in order for you to have increases in compensation during that period? A. By amending the contract, and that applied to every attorney employed.

Q. Was it a difficult process or a time-consuming process that you referred to? A. It was, indeed.

Q. Tell me how is it different in the process in your 1957 contract which provides that from and after the approval of this agreement by the Commissioner of Indian Affairs the compensation of the attorneys for General Counsel services, which includes you, may be increased by providing in the Tribal budget for any such increase, provided,

583 however, that any such increase in compensation
shall not take effect until such time as the Tribal budget has been approved by the Tribal Council and the Commissioner of Indian Affairs.

Isn't that the same process that you have been describing? A. It is the same in principle, but in substance, in that you save this whole litter of legal papers and memoranda. Once the Tribe with its rights as the client

in this case had determined what it wanted to do and approved the budget, with all the multifarious other items in the expanding Tribal budget, and then that went through to the review of the Commissioner, and that was enough, without this extra layer of burdensome amendments.

Q. Did it bypass the Tribal Council under the 1957 contract? A. Oh, no, no.

Mr. Pittle, the budget session of the Council occurring every spring is the longest and most painstaking one the Council has, and they go into every item.

Q. Yet every increase you received under your 1957 contract was received by an amendment approved pursuant to a resolution promulgated by the Tribal Council, were they not? A. Well, just from recollection, I would go along with your statement. I would have to double check it because we thought that this was rendering more efficient

584 this laborious process, and the men in charge of this in the Bureau in completely friendly discussions said it did not, because if it were established in all tribes, they could not be chasing the tribal budgets around to find out what was done and what wasn't done, and I agreed in a very amicable way, to suggest to the Tribe in another amendment, to take it out and go back to the old system, of amendment by resolution, and writing up an amendment to the contract, which we did, and I forget just which amendment we did that for, but it was done.

They just couldn't find these tribal budgets, and they didn't want to do it this way, and I said: Very well, I will go along with you on it, and try and suggest to the Tribe that it is not practical from the Bureau's point of view.

Q. All right, but after your 1957 contract was approved, you received your first increase in compensation by Amendment No. 9 in 1961; is that correct? A. Let me check.

Q. I direct your attention to full page 90 and 91, Plaintiff's Exhibit A, which is Amendment No. 9. A. Did you say after the 1957 contract?

Q. Yes. A. Well, the first one was in '48.

What page did you say?

Q. Page 90 and 91. A. Yes, I guess that is correct.

585 That was to—no, there was one in '58, to \$25,000.

Are you skipping that one?

And then the one you are referring to is \$35,000 and that is in 1961?

Q. Yes, that is correct.

But were those increases obtained after a resolution approved by the Tribal Council? A. Yes, sir.

Q. And you say that nevertheless, notwithstanding the approval by the Tribal Council of these increases, the provision respecting your compensation on page 40 of your 1957 contract, was substantially different from the provision—the lack of the provision or process under your 1947 contract? A. No different. Merely mechanical, and it didn't work out on the budget basis, and we went back to the amendment basis. The same as in any other contract, you amend it by agreement of the parties.

Q. Now, your 1947 contract did not specify by name or description the nature of the particular cases which would be considered claims cases, did they? A. No.

Q. Yet your 1957 contract, on page 41, of course, lists five cases as claims cases? A. Yes.

Q. All entitled The Navajo Tribe of Indians
586 Against the United States, and all in the Indian
Claims Commission? A. Yes.

Q. I call attention to the provision of paragraph 4(b) of your 1957 contract on page 37, which defines claims as: It shall be the duty of said attorneys to investigate and formulate any and all claims of the said Indians against the United States and officers thereof including claims arising out of violations of the Treaty between the United States and the Navajo Tribe of Indians, ratified July 25, 1868, and proclaimed August 12, 1868, and claims relating to the taking of, or failure to make available to said Indians, lands which the United States is under obligation to make available to said Tribe and which said Tribe had the legal

and/or equitable right to own, possess or use. It shall be the further duty of said attorney to take such action as is necessary and proper, whether before Government commissions, agencies, or in the Courts, to obtain a final determination by Court judgment or otherwise of all such claims which said attorneys consider to have substantial merit.

Now, at this point I ask you, it shall be the duty of the Claims attorneys to investigate and formulate any and all claims of the said Indians against the United States and officers thereof, contemplate as claims cases any litigation or any proceedings against any one other than the United States? A. You read from page 40?

587 Q. Page 37 to page 40, the provision for filing claims. A. My recollection is it does not, counsel.

Q. Now, I direct your attention to page 40 of Plaintiff's Exhibit A, which is paragraph 4(b), which provides for compensation for claims services, and it provides: Attorneys Norman L. Littell and C. and J. Alexander, as compensation for their services in investigating, formulating and prosecuting claims of the said Indians against the United States, shall receive, in addition to the foregoing retainers, out of the funds of the Navajo Indians, 10 per cent of any sum or sums of money or of the value of the property recovered, saved, or obtained by the formulation or prosecution of such claims, or the settlement or compromise thereof either before or after litigation.

Now I ask you as an attorney who has represented the Navajo Indians for 17 years, and who has become somewhat familiar with, in all modesty, with Federal Indian law and claims against the United States by Indian tribes, do you know of any litigation in which an Indian tribe has obtained by way of judgment against the United States a specific tract of real estate, or specific property, other than money? A. Well, the only one that occurs to me, there clearly was one in the Palm Springs case in California, and a Justice of the Supreme Court of California resigned

to take that case for the Palm Springs Indians, and
 588 I have no doubt that there are many more.

Q. All right, you are speaking of Leoritas [sic] (Lee Arenas) against the United States? A. Yes, I think so.

Q. Do you consider that a claims case? A. That is not an issue.

Q. I am asking you a question about claims cases. A. I will not answer the question because without studying the opinion, I can't tell you.

I just remember vaguely in answer to your question that he sued for land and got a substantial amount of land back.

Q. To refresh your recollection, and I ask the Court to take judicial notice of the Supreme Court of the United States opinion in Leoritas vs. United States, and the fact that that suit was instituted under Section 345, of Title 25 U.S.C., which provides that any individual Indian who seeks an allotment of land may sue the United States.

Do you consider that a claims case? A. I would not, counsel.

Now, you refreshed my recollection on allotted land, and I remember now that this was allotted land.

Q. All right, you don't know of any case in which any Indian tribe has proceeded against the United States
 589 and recovered a specific piece of real estate, do you, or other specific property? A. I don't know of one of my own knowledge. I assume there are many.

Q. You assume that there are many? What did you contemplate, you and your client, when you entered into the provision providing that you may receive 10 per cent of the sum or sums of money or the value of property recovered? A. Well, Mr. Pittle, this was a provision given to me by the Bureau of Indian Affairs way back there. This is old stuff. I thought this was stock in trade for them.

Q. Did you give the matter any thought? A. I beg your pardon?

Q. Did you give that particular provision any consideration in your negotiations? A. Surely.

Q. What did you contemplate? A. It was one of those that is fairly axiomatic. In fact, I thought it should be expanded, as a matter of fact, to allow in the modern concept any Indian attorney suing for a tribe against people who wrongfully get their land by usurpation or trespass, but we never did anything on this front.

Q. You mean, even acquire title suit as against some individual who is claiming property? A. Oh, no, that would be General Counsel, but I suppose if you recover, 590 if you sue to recover, but this is purely academic because I merely mean I thought of it to this extent, what you do if you have to sue an individual and recapture land that may have been taken away from them a long, long time ago, which has happened in the best of tribes, but that is not there.

Q. Now, sir, after your 1957 contract was executed and approved in November of 1957, it was made retroactive to August 7th of 1957, was it not? A. That is correct.

Q. And before you commenced this present litigation your contract was amended I believe 12 times? A. Thirteen times—well, now, before the litigation, you are correct.

Q. It is since then amended again? A. No, the Secretary had not approved Amendment 13.

Q. It had not been approved? A. It has not been approved for a year and I think eight months.

Q. What does Amendment No. 13 provide? What would it provide if approved? A. It would have provided for salary raises at four juniors at Window Rock, for lack of which they have all resigned.

Q. It has nothing to do with this particular litigation? 591 A. It has a great deal to do with it, not as to the issue, but as to the general purpose of destroying the Legal Department of the Navajo Tribe.

Q. Would you care to expand that answer and explain it? A. Yes, sir, I would be very happy to.

Q. Are you charging that the Secretary of the Interior is destroying your legal relationship with the Tribe? A. I do, indeed. I charge it to the hilt.

There is nothing left of the Legal Department, except myself and Mr. Leland Graham, who was in my office, who has also resigned, but I begged him to stay on and help carry the load.

The last man leaves at the end of this month, Spencer Johnson.

Q. And this is all because of the Secretary of the Interior? A. There is not a question; no shadow of doubt about it.

Q. Will you please describe again once more clearly for the benefit of the Court, and at least for me, the mechanics for the amendment to your 1957 contract? A. All these amendments that you are talking about?

Q. Yes, I am not talking about each individual amendment, but in general, what are the mechanics for amendment? A. The mechanics for amendment are that

592 you—we took up the matter of principle, what was involved, when we wanted a new attorney—

Q. Who is “we”? A. Well, I did, or whoever was on the job locally at Window Rock. It might have been Mr. McPherson came, it might have been he, it might have been Walter Wolf before, or I personally, as a general rule, took up such matters as involved the personnel of the Legal Department.

Q. With whom? A. With the Advisory Committee as a preliminary matter of discussion to discuss it, and from there, if it were considered advisable and approved, it went to the Council, and then it would be discussed in the Council, and a resolution would be submitted and voted upon.

Usually the resolution was approved in advance by the Advisory Committee, not because it had to be, but because

this was sound practice, to have it discussed as thoroughly as can be.

Q. Upon approval by the Tribal Council, then what happened? A. Then an amendment would be prepared, I mean, an amendment to the contract would be prepared.

Q. By you or your legal office? A. Usually by a member of the staff. In the early days I prepared them all, back in the old contract, but not now.

593 In these latter days, when I had assistants, the draft would be prepared by somebody in the legal staff.

Q. And after the amendment was prepared, where did it go? A. It went around to the various members of the legal staff, and went to me, to see if it was all right, and then it would go to members of the legal staff, perhaps this would be done simultaneously, so any suggestions or corrections could be cleared.

It would also go to the executive officers of the Tribe, to the Chairman, or Mr. McCabe, the Executive Secretary of the Tribe, and when it got into reasonably final form, I mean, so that the bugs were out of it, like the draft of any other contract in its original drafting stage, it would then be submitted.

Q. To whom? A. To the Chairman of the Tribal Council, to the Advisory Committee, to the Executive Secretary.

Q. And the Chairman would execute it? A. Sir?

Q. And the Chairman of the Tribal Council would execute the amendment? A. Yes; if authorized by the resolution.

Q. And then it would be submitted to the Department of the Interior for approval? A. A memorandum from
594 him to the Superintendent, and the Superintendent to the Area Director, the Area Director into the Commissioner of Indian Affairs, and then to the lawyers.

Q. So the amendment began with a resolution which was promulgated by the Tribal Council, and the resolution if approved, would be submitted, and would be published.

and your office would prepare the amendment and submit it to the Advisory Committee and the Chairman of the Advisory Committee? A. That is correct.

Q. It didn't go back to the Tribal Council? The amendment didn't go back to the Tribal Council, did it? A. No. The most conspicuous exception to that, counsel, to keep the record straight is the interim contract of August 7, 1957, which was discussed verbatim with the Council.

Q. Well, that was not an amendment? A. No, that was one case in which the details went to the Council.

Q. All right, but I am talking about the 12 amendments to your 1957 contract, and you have told me that after the resolution authorizing the amendment, your office prepared the amendment and submitted it to the Advisory Committee, and to the Chairman of the Advisory Committee, and that the amendment does not go back to the Tribal Council; is that correct? A. This is correct, and this is true of all contracts of the Tribe.

595 Q. Now, let us look at paragraph 4 (a), on page 40, of your 1957 contract, which we discussed before, and particularly the provision which provides, that there shall be no change in the compensation of Mr. Littell and Mr. Alexander during the first five years of this contract.

Now, the contract was, as we know, executed in November of 1957 retroactively to August 7, 1957.

Is it correct to state that under that provision as it then was you were not entitled to an increase in compensation until August 7, 1962? A. As it stood, yes. As it stood until amended by the Council.

Q. All right, sir. Now we will refer to Amendment No. 9, which appears on page 90 of Plaintiff's Exhibit A. That amendment was executed by the Chairman of the Navajo Tribal Council and you and your staff of attorneys in August, 1961? A. Yes.

Q. And that provides for an increase in your compensation to your present retainer of \$35,000 a year, does it not? A. That is correct.

Q. And that amendment was executed only four years after your 1957 contract? A. This is correct.

Q. And that amendment was executed pursuant to
596 a resolution? I am asking you whether it was? A.

Oh, pardon me, I was waiting for you to give me the page.

Q. Well, I am asking you. A. Yes, it was.

Q. And that resolution, which does not appear—I believe that is on page 133 of Plaintiff's Exhibit A, Resolution CJN-38-61, which authorized the amendment of the contract to increase your compensation to \$35,000?

That is the resolution which authorized Amendment No. 9, isn't it? A. Yes, it is.

Q. Now, I believe you were out of the country at the time the contract was executed or at the time the resolution was adopted? Which was it? A. I was out of the country at the time the matter was considered before the Navajo Tribal Council.

Q. That would be when the resolution was being considered? A. That is when the whole debate took place, yes.

Q. And that was in June of 1961, approximately? A. I think it was the month of May. I believe I flew back on June—no, you are right. I flew back on June 27th.

Q. The certification to the resolution states that the Chairman certifies that the foregoing resolution was
597 considered, and so forth, on the 30th day of June, 1961, and you were where at that time, Mr. Littell?

A. What?

Q. Where were you at that time? A. I must have arrived in Washington. I must have arrived in Washington about that time because my recollection is that I flew back on the 27th or 28th, along in there of June.

Q. You flew back from where? A. From Istanbul, Turkey.

Q. And Mr. McPherson represented your office at the Tribal Council meetings which considered the resolution?

A. He was the Assistant General Counsel and did the representation to the Council, yes.

As far as representing by office was concerned, I don't know what you mean by that. I don't wish to be committed to that, counsel. I didn't know what he was saying to the Council, nor did I authorize him to say anything, except I cabled from Turkey when I knew the matter was under consideration, and said anything the Council decides is satisfactory to me, as usual.

Q. Have you had occasion to look at the minutes of the Tribal Council during the time the resolution which authorized your increase in compensation was debated? A.

Quite some time ago.

598 Q. Quite some time ago? A. Yes.

Q. You know that no disclosure or explanation was made to the Tribal Council at that time, do you not, that your 1957 contract precluded an increase in compensation for five years, don't you? A. Yes, I do, and it is a matter of some concern to me that that wasn't specifically stated, although it would have made no difference whatsoever.

The Council has the power to change any contract and amend any contract it has.

Q. Well, Mr. Littell, I am not here to argue with you. Any two parties to an agreement may amend a contract whenever they choose. I am not debating it. A. That is right.

Q. My question is directed to you, and you have answered it, that the Tribal Council was not informed during the debate on your resolution that the 1957 contract precluded an increase in compensation for five years? A. There were so many that knew it, counsel, and I think that is Mr. McPherson's position on it, but I can't speak for him.

The Court: I think we will take the morning recess at this time.

(Thereupon, a short recess was had.)

599 By Mr. Pittle:

Q. Mr. Littell, during the time Amendment No. 9 was executed and Amendment No. 11, which appears on page 100 of Plaintiff's Exhibit A, Paul Jones was the Chairman of the Navajo Tribal Council, was he not? A. Yes.

Q. And he executed both of those amendments on behalf of the Tribe? A. Yes.

Q. Your relationship with Mr. Jones as Chairman was rather amicable, was it not? A. Sometimes extremely hostile.

Q. When was it hostile? A. Well, I think the most outstanding case was when the Arizona Public Service Corporation attempted to force the Tribe in the writing of the lease agreement for the construction of a power plant on the Navajo Reservation, which is now going and operating, a \$150,000,000 project actually, and they endeavored to force the Tribe to waive sovereign immunity.

Q. The Tribe waive sovereign immunity? How could this be? A. Now, Mr. Pittle, if you permit me to complete my answer, I will make all these things clear. I can't do it in a dozen words. This is a very complicated question.

600 Q. Well, my question had to do with your relationship with Mr. Jones. At this time I am not inquiring as to the Arizona Public Power contract. A. You can't have the answer without my explaining it.

The Court: All right, let him explain it.

The Witness: Without my explaining the difference between us.

The Arizona Public Service Company wanted the Tribe to waive sovereign immunity, so that it could submit to suit under this agreement.

This was and is one of the live issues at Window Rock and they persuaded Mr. Jones that it should be waived by repeatedly threatening to remove the plant to some other location off the reservation if they didn't get sovereign immunity waived.

We advised strongly against it because the Tribe could be wiped out—

By Mr. Pittle:

Q. You mean we, meaning the legal department? A. I mean the legal department, stemming from my own opinion.

Q. All right, go ahead. A. And I explained to Mr. Jones, as I did to the Council and the Advisory Committee, that even the United States Government has not waived
601 sovereign immunity, but as for contracts only until March 3d, 1887, and not for torts and negligence liability until August 13, 1946, and that the State of New Mexico has never to this day waived sovereign immunity.

Why will you? And you could be reduced to helplessness with a few outstanding judgments as certain municipalities and corporations have been throughout the country.

Now, Jones, and this is background as briefly as I can state it, and he went against the recommendation of the General Counsel, and he held meetings at Window Rock—

Q. When? A. I can't give you the date. I will look in my notes.

Q. In what year? A. I think it was 1960 or '61, as nearly as I can recall right now.

And he chose a time when Mr. McPherson and I were both conferring at Salt Lake with Mr. Boyden, and then he called me, and he told me that he had these attorneys coming out from Washington, Mr. Heiden, and Mr. Weinberg, and two Vice Presidents of the Arizona Public Service, and their General Counsel.

And I said: That is fine, Paul, I am glad they are coming. You can particularly listen to Mr. Heiden and Mr. Weinberg, they are outstanding lawyers in my experience
in the Department of the Interior, and by all means.

602 You have heard my point of view, and I want you to have their point of view, and every point of view, and every bit of legal advice you can get.

Q. So what happened? A. He still stood tough, with the

former attorney, Lloyd Davis, someone associating himself with the same position, but I won't get into that.

We had a sharp impasse. This group met before the Advisory Committee, and the General Counsel of the Arizona Public Service told me he never had such a taking apart on cross examination in his life.

Q. This was in 1960? A. I think so. I can get the date and fill it in if you wish.

Q. So what happened? A. But Jones stood tough for the waiving of sovereign immunity.

We didn't waive it. We didn't waive it, the Council stood with my recommendation to the Advisory Committee and the Council, and if I may illustrate, sir—

Q. As far as I am concerned, you have completed your answer to my question. A. I haven't quite completed my answer because Mr. Jones subsequently apologized to both

603 Mr. McPherson and to me to whom he had been extremely rude during this whole matter, and here in Washington, when we thrashed the matter out in the final stages at lunch, he apologized to both of us.

He said: I was wrong for the Tribe, and he said: I want you to tell me when I am wrong, and if I don't hear you the first time, tell me again.

Q. Is that when you taught Mr. Jones humility, Mr. Littell? A. I never taught Mr. Jones humility, and I never said I taught Mr. Jones humility.

Q. You have heard the statement attributed to you, though, have you not? A. I have heard so many statements attributed to me, Mr. Pittle, that it is perfectly ridiculous, including some that you have said.

The Court: All right, don't get excited.

The Witness: I apologize for that last statement, Your Honor.

By Mr. Pittle:

Q. As I said, I am not here to argue with you, sir. A. I apologize and withdraw the last statement.

Mr. Wiener: May we strike out anything beginning with the question, Was that when you said you taught Mr. Jones humility?

The Court: All right, let it be stricken.

By Mr. Pittle:

604 Q. Now you persuaded Mr. Jones and the Tribal Council that the Tribe should not waive its sovereign immunity? Is that what you said? A. That is correct.

Q. Now, can you tell me how the Tribe, an unorganized Tribe, such as the Navajo Indians, Mr. Littell, could waive its sovereign immunity if it wanted to? A. Well, we are entering into legal discussion, and I will do my best, Mr. Pittle.

By resolution they could waive their sovereign immunity, but it would take, in my opinion, concurrence of Congress, but I cannot tell you how easy that would have been to get, because I was called to a meeting of all the Senators and all the Congressmen, except two that were sick, from the States of Arizona and New Mexico and Utah, and the Legislative Assistants, in the office of Barry Goldwater to explain why I took this tough position in advising the Tribe on sovereign immunity, and it was a very warm session in which Udall himself was present.

Q. Yes, sir. The fact is the Tribe itself could not waive its sovereign immunity no matter what kind of contract it entered into, and isn't that the fact, and isn't that the law, as you understand it? A. Mr. Pittle, if they had written this—

605 Q. Will you answer my question? A. I am not sure. I am not sure and I think it would be an extremely dangerous thing to the Tribe.

The Court: All right, let us keep our voices down.

Mr. Pittle: If the Court please, I ask a question and I get a speech.

The Witness: I'm not sure, Mr. Pittle.

The Court: Now, just a second. As you know, Mr. Pittle, you called this party as an adverse witness. You may cross examine him or try to impeach him, and you may do anything within reason.

And the witness must understand that you cannot get anywhere in this case or in this hearing if you are going to get excited and let your blood pressure rise because someone might go to the hospital.

Because all I am interested in is to find out what the facts are, and I will have to make a decision some time on what I hear here.

Let's try to keep cool, calm and collected.

All right, let us proceed.

The Witness: I think the best answer to your question, Mr. Pittle, is that this is a very controversial question, and I think if the Tribe had written it into a contract as requested by White and Case, or Sullivan and Cromwell, or whoever it was in New York representing the bondholders of the Arizona Public Service, that we probably would
606 be bound by it, and if it took an act of Congress, they could easily get it through.

By Mr. Pittle:

Q. I will ask you again. It would require an act of Congress, wouldn't it? A. I would not say so. I think this is the conservative position, but I think the Tribe could waive itself and be in a submissive position if it waived it by resolution of the Navajo Tribal Council.

The Court: Now, let me ask Mr. Pittle—maybe you have lost me or I have lost you.

Will you give me some idea what the purpose of this interrogation is? If you want to?

Mr. Pittle: I will be glad to. It is to test the witness' credibility and to test his competency under this contract.

The Court: Competency under the 1957 contract?

Mr. Pittle: Yes, Your Honor.

The Court: Competency as to what?

Mr. Pittle: We have put in the defense, as you know, and we are showing that there are substantial reasons why the action taken by the Secretary was not unreasonable, and we are showing that the plaintiff has come into Court with unclean hands and is not entitled to equitable relief, and this is all in that line.

607 The Court: Let me ask you, just as a matter of information, and when I ask a question, of course, that should not indicate to anyone how I personally feel, because I can't decide this case until I hear all the evidence on both sides, and besides reading your briefs, and findings of fact, because this is a very complex, complicated matter, and I have had some experience with it, as you know from the contempt hearing.

Mr. Pittle: Yes, Your Honor.

The Court: But taking it chronologically, the meeting was held in the Secretary's office on June 21, 1963, and Mr. DeRose said he was there only 10 or 15 minutes, I think, and then the conference was adjourned and broken up, or something, and he came back to Arizona, and a resolution was adopted by the Advisory Committee, and signed by them, making certain charges.

Now, were all these things that you have been inquiring about discussed with the Secretary in that brief meeting which led up to this?

Mr. Pittle: The principle ones were, and the Secretary was advised, and you will hear testimony about that from the witnesses themselves.

The Court: Well, frankly, one of the difficulties I have, and this goes back to the first hearing, and this is all sort of a continuous story, you will have to admit that.

608 Mr. Pittle: But we are trying to tell the whole story now.

The Court: You are trying to tell the whole story now because eventually the Court of Appeals is going to have to get the whole picture.

Now, if we go back to the controversy where Mr. Zimmerman went down to Arizona when Mr. Littell tried to get the contract considered by the Council, and before that, is there any good reason why after this controversy arose why it could not have been put before the 74 elected delegates to thrash this whole matter out and say: Look, to the old guard and the new guard, here are allegations made against our lawyer that he is a crook, that he is dishonest. Let us look into this thing, and if we need any help under paragraph 12, the termination part, we can then ask the Secretary of Interior for his advice and help.

Now, I am trying to find out why that wasn't done.

Mr. Pittle: May I answer Your Honor's question at this time?

The Court: Yes.

Mr. Pittle: The record already shows that the duly elected group under Chairman Nakai came to seek the advice of the Secretary, and the record shows that the Secretary and others suggested they take the matter to the Tribal Council, and the record further shows that
609 they did not do it because they felt that they could not get the necessary majority of those in the Tribal Council—

The Court: You say, "they"? Whom do you mean?

Mr. Pittle: Chairman Nakai and the newly elected Advisory Committee members, the members of the Council, they believed that Mr. Littell would sway the Council against them, and that would be the end of it, and then submitting the resolution of June 25th and the letter of August 22d three months later, the Secretary then had looked into the matter for the first time and realized his mistake and tried to rectify it.

The Court: Well, I don't know what the situation is down in that part of the country now; maybe they are still fighting and squabbling; I don't know.

Mr. Pittle: I believe you will see it.

The Court: Is there any reason why could not take this whole matter now and put it before the Council?

Mr. Pittle: Well, there is no reason why it could not be, but the situation as it exists at this time, I understand, that there is a majority of the Council members who may not be inclined to terminate the contract, but the Secretary, having looked into it, to try to commence administrative proceedings to rectify what he believes was a serious error.

The Court: Maybe I have been thinking out loud now, but what I had in mind if some way could be agreed
610 upon or worked out, by maybe postponing this hearing, and let the Council hear this whole thing, and if Mr. Littell has done anything wrong, they can come up and say: Well, now, we think that you have charged too much money, or that you charged for claims work when you should have been charging for work under this general agreement, as General Counsel, on the retainer fee, and see what happens.

Now, I don't know whether that could be done or not. That might be one way of solving it.

Mr. Pittle: I don't believe it could be done with the existence of the injunction now running.

The Court: All right. Just put it out of your thoughts.

Mr. Pittle: And you will recall testimony in the previous proceeding regarding the committee of opposition that the Secretary was supposed to have directed Mr. Littell to organize? Well, that was for the very purpose of trying to get the two opposing factions together, and if I am permitted, Your Honor will hear more testimony from the Secretary himself concerning this.

The Court: All right, let us proceed.

By Mr. Pittle:

Q. Mr. Littell, during your 17 years that you have been General Counsel and Claims Attorney for the Navajo
611 Indians, have you ever undertaken any action to organize them under the Indian Reorganization Act?

A. Mr. Pittle, the answer is, no. I don't initiate policy.

Q. You are familiar with the Indian Reorganization Act? A. Generally speaking.

You know of course, the Tribe voted it down some years ago?

Q. Yes, I am aware of it, and I asked if you had taken any action since.

Now, I call your attention to Amendment No. 11, which appears on page 100 of Plaintiff's Exhibit A. That amendment was executed in April, 1962, and I direct your particular attention to Provision 3 (c) on page 103, and of course, you note that the Section 4 (b) of your original 1957 contract was amendment by amendment, to include as claims cases among the five listed, in addition to the five listed in your original contract, the case of Healing vs. Jones and the Navajo Tribe against the State of Utah.

Have you noted that? A. Yes, I am aware of this.

Q. Now, you are aware also that the resolution which appears on page 108 of Plaintiff's Exhibit A, which was promulgated on February 22, 1962, authorized the employment or retainer by the Tribe under your supervision of Leland Graham, as General Counsel and
612 Claims Attorney, and authorized an increase of compensation for Robert Walton, who was then a member of your staff? A. Yes.

Q. You will note that the resolution—that that is the resolution upon which Amendment No. 11 was based? A. That is right.

Q. You will note that the resolution does not provide for the change in category of Healing vs. Jones or the State of Utah as claims cases? A. Yes.

Q. So under the procedure that you had told us about earlier for amendments, this amendment was not authorized, was it? A. It didn't need to be, and it doesn't matter to me whether they are in there or not.

Q. Mr. Littell, let us keep our personalities out of it. I don't care whether— A. I am only explaining, within our procedures outlined to you, Mr. Pittle, it doesn't make

any difference. The policy has been established of listing claims, and these are already determined, and Healing against Jones has been adjudicated.

Q. When did Healing against Jones become a claims case, Mr. Littell, within the terms of your contract? A. I never regarded it as a claims case as long as it was in the
613 administrative procedures before the Department of the Interior. We had hoped to find that solution, and I can show you the Council minutes where that was explained, and had they been able to find a solution for Healing against Jones, and the boundary line case between the Hopis and the Navajos, there would have been no discussion of claims.

But when that failed, and the Government consistently refused access to the Navajos to the lands to which they were rightfully entitled, without at this point quoting the language from the contract with which you are familiar, it became a claims case, and that was with the passage of the Act of September 2d, 1958, and more particularly when the Government filed its intervention, and you get the decision in 174 Federal Supplement.

Q. And the claims case then, or it became a claims case, according to your statement, when the Act of Congress authorized the institution of suit? Is that what you said or did I misunderstand you? A. Substantially that, but it still might have been settled and disposed of had there been any legal basis for it, and then it would have vanished from the scene as a claims case.

Q. It became a claims case then? When was the Act of Congress passed, 1958? A. I think it was September
614 2d, 1958. It might have been September 22d. There seems to be two twos in my mind.

Q. It is your position then that Healing vs. Jones became a claims case with passage of the Act which authorized suit against the United States and the Hopi Indians; is that correct? A. I would say that this was definitely settled when the Government filed its intervention in the

case, and potentially it was a claims case with the filing of the suit, but it could have still vanished into oblivion, as I told you.

Q. I understand. A. And when the Government filed its intervention and denied access to the Navajo Tribe to the lands, at that point we were in conflict, and we were suing the United States Government for lands wrongfully withheld.

Q. And the Government took the position that it did not own any of the land in question, did it not, in that litigation, and it interposed a defense of lack of jurisdiction, did it not? A. The Government?

Q. Yes or no. A. No. The answer is no.

There is no yes or no answer to that. They did claim to hold legal title to all those lands.

Q. The United States still holds legal title, doesn't it? A. Trust title.

Q. Were you claiming legal title for the Navajo Indians in Healing against Jones against the United States, or were you simply claiming the equitable title which would be for the benefit of the Navajos? A. We claimed that the equitable title already existed, and we were denied the equitable title and that the legal title would vest with the litigation which reached its conclusion under the Act of September 2d, 1958.

Q. Now, with respect to the Navajo Reservation as it presently exists, the United States owns legal title to the entire 24,000 square miles, does it not? A. No. Well, it does—yes, in the technical sense of trust title.

Q. The United States owns the legal title, does it not, Mr. Littell? A. Yes, this is correct.

Q. And it holds it in trust for the use of the Navajo Indians? That is what you are saying, is it not? A. Substantially that is correct, yes.

Q. And the land involved in Healing against Jones was in the same category with respect to legal title; isn't that so? A. The whole relations, no. The whole question of

616 title has been changed by the litigation pursuant to the Act of 1958.

Q. All right, go ahead. A. In that, prior to that time this was an Executive Order, and Your Honor, if I may say this, and make clear with the maps when I get to my presentation, and I won't endeavor to extend my answer to your question by illustration but this involves an area of 2,500,000 acres set aside December 16, 1882, by Executive Order of President Arthur, in the question of the relative rights of the Navajo and Hopi Tribe in there.

That Executive Order, counsel, to answer your question, was subject to revocation at any time, as your senior officer, Assistant Attorney General Barry Morton, testified before Congress. It could have been revoked by reason of its mineral or natural resources that the Government might want in war time.

Q. Now, let us go back just a moment and try it this way, Mr. Littell.

In *Healing* against Jones the United States took the position that it was merely a stake holder for either the Navajos or the Hopis, did it not? A. Well, it you take—yes, but it had taken that position from historic times.

Q. That is right. A. And the Navajos were denied access to what they were rightfully entitled to.

617 Q. And the United States also was dismissed from the litigation with its jurisdictional defense on the grounds that there was no justiciable controversy as between the Navajos against the United States; isn't that true? A. This is true. The motion of the United States was overruled.

Q. And yet you say that *Healing vs. Jones* is a claims case within the category of your definition under 4 (b) of your contract which talks about claims against the United States? A. I do, indeed.

Q. It resulted ultimately in a claim against the Hopis, did it not? A. By your own terms, Mr. Pittle, no.

The United States Government held title to this land, and we could not do a thing with it, unless the title as

between us and the United States Government, meaning the Navajo Tribe and the United States Government, vis-a-vis the Hopis, was settled by litigation.

Q. Let us not get the matter confused.

We had I though established that the legal title to the land in dispute in *Healing vs. Jones* was in the United States and still is in the United States. The United States held it in trust for either the Navajos or the Hopis, which-
 618 ever could prove in that three-judge court that they were entitled to the equitable use? Isn't that correct, Mr. Littell? A. This is correct, but it has consistently denied to the Navajos the recognition of the right to which they were entitled.

Q. Why? A. Because they never recognized the effect of the Secretary settling the Navajos there legally under the Harriman report, by approval of the Harriman report on February 7th, 1931, by recognition of the grazing regulations of the Navajo Tribe over the entire area, outside of the Hopi land in District 6, on June 6, 1937.

And furthermore, the Act itself in September, 1958, confirmed every Navajo legally resident there, for purposes of residence rather than merely transient, I gathered they meant, was legally resident there and could not, and they cannot be removed.

This is a recognition and an establishment of the Navajo Tribe that they never had before.

Q. All right, sir, but not as against the United States?

A. Indeed so. The United States as the trustee and title owner physically could keep them out, or move them around as they did from time to time, moving some Navajos three times into three different areas after a long-established historic residence, and just pushed them back.

619 Q. Because the Hopis were claiming adversely to the Navajos? A. Because the Hopis were supported by the Government in claiming that the Navajo settled—had no right to settle these lands, and the United States Government gave it to them. There was repeated denials

of Navajos efforts and the most brutal dispossession of Navajo interest in this area.

Now it can be no more.

Q. But your judgment in Healing against Jones did not result in a judgment against the United States in any way, did it? A. It resulted in a judgment which is conclusively binding on the United States Government, and it can never escape from it, after all these years of manipulation between the tribes, and it is settled and it is in effect a judgment against the United States so far as its effect is concerned.

Q. How is this a judgment against the United States when the United States still owns the legal title? A. Mr. Pittle, the United States Government was in the litigation throughout this as an intervenor. Their attorney sat there during the whole time. It was bound by this judgment.

It could intervene at any time and tell the Court, You should not do this, or you should not do that, and maybe it did, and maybe that is what is the trouble with the decision.

620 Q. Am I in error, when my understanding is that the United States was dismissed as a party to the litigation before the three-judge court on the ground that there was not justiciable controversy by the Navajos against the United States? Is that in error? A. I believe that that happened, without going back to my pleadings.

Q. That is all I am asking you. A. Well, why did they stay at the party? They stayed there throughout as trustee defending their legal position.

Q. That is your conclusion, of course. A. They were there, Mr. Pittle.

Q. Yes, but I asked the reason why, and I don't want to argue about it.

Mr. Wiener: If Your Honor please, Mr. Pittle was asking for the witness' conclusion, and I think the witness has been able to take care of himself.

The Court: All right, have you finished?

The Witness: I have.

By Mr. Pittle:

Q. Now, I would like to go back to your statement of a few moments ago that Amendment No. 11 did not require a resolution authorizing the change in the category of Healing against Jones as a claims case, and I understand from your previous testimony that the mechanics for
621 amending your contract is for a resolution to be promulgated, and then an amendment be prepared, and then submitted to the Advisory Committee, and signed by the Tribal Chairman.

Will you tell me why it wasn't necessary for a valid amendment to have Healing vs. Jones included in a resolution which authorized a change in that category? A. You skipped some of the history, counsel, and that is one of the troubles.

Back at the initiation of this contract, it was explained why we broke down the claims and specified them, by reason of a ruling of the Internal Revenue Bureau, which had become widely known among Indian Claims attorneys, that you had to separately designate cases, because up to that point, up to 1957, we didn't have any designation, and if one case came through, the Bureau might have said: You can't get paid on this until they are all done.

So it had become the established practice of Indian Claims attorneys, which I learned from others, and I didn't really know it myself, as I wasn't, I am afraid, too alert about it, that this was the practice and very necessary to designate separate claims. So if you finished one case, that in the Internal Revenue Bureau's eyes was completed, because you were allowed to relate that income back over a certain number of years, and I believe it is ten years, and I
622 am not quite sure but I think that is it, until you begin working on the case, because you didn't win all that in that one year.

Now, this is why in that first paragraph that you read in the contract of 1957, this was done, and I have an extensive explanation in the minutes of the Advisory Committee to

whom the Council delegated this thing, when we considered it over a quite a number of days in great detail. And then it was customary after that to limit, to designate the claims.

Secondly, the second point I make in explanation of this, I don't care whether it is in or not, in the light of hindsight in this very nasty attack that has been going on. Of course, I would as soon it be limited, but I don't care whether it is there or not.

Q. You don't care whether what is there or not? A. Whether those two cases are designated as claims in Amendment 11, because if they are claims under the contract, they are claims, whether they are in that or not.

Now, let me give you the other reason aside from waiver of the fact that I don't care whether they are there or not. Obviously, I must have cared, because I put them in, or I let them be put in at some suggestion in consideration of these problems, and for the reasons I stated.

In the Council minutes, in the Council minutes that I will—

Q. I am going to ask you about those in a few
623 minutes. Go ahead. A. Very well, then,

Mr. Wiener: The question is: "Why" and I think the witness is entitled to answer it.

The Court: Well, have you finished?

Mr. Pittle: I think the witness has not only answered that question but five others I didn't ask him, and I ask him to listen to my question.

The Court: All right, let us proceed now.

By Mr. Pittle:

Q. You say you don't care whether Healing vs. Jones is a claims case? Does that mean— A. I didn't say that. I didn't say that.

Q. What did you say? A. I don't care whether it is in this amendment or not. I don't care whether any one is in this contract named as such, but if it is a claims case, it is a claims case.

The only reason for having it in was this designation on Internal Revenue business, and secondly, completing my answer, both of these cases have been considered and appropriated for by the Council as claims cases, as I will explain more fully in my testimony. It was routine. There was nothing exceptional about it to designate them in accordance with this practice.

Q. All right, sir. A. They have been appropriated for.

624 The Court: Let me ask you a question, Mr. Pittle. I have heard a lot of talk here about whether these cases are claims cases or whether they should have come under his general contract. The Government has accused the attorney of wrongdoing, and I think of being dishonest, and cheating the Navajo Tribe.

Isn't there some Federal statute which holds in effect that if money is taken from the Indians or embezzled or stolen that it is a criminal offense?

Mr. Pittle: I don't know of that particular statute.

The Court: Well, now, if he has committed a crime, why wasn't this matter presented to a Federal grand jury in Airzona to thrash the whole thing out? And get him indicted if he has done anything wrong?

Mr. Pittle: Your Honor, the quick answer is because the injunction superseded this.

The Court: I have heard a lot of talk about this. Why didn't the Government present this case, or why don't they do it now?

Mr. Pittle: Because the Secretary is under injunction.

The Court: That is what should be done. If this man has committed a crime, bring it before the grand jury down there and get him indicted if he has done anything wrong.

Mr. Pittle: If the Court please, as soon as these
625 facts were ascertained, the Secretary asked Mr. Littell to show cause why he should not start an administrative proceeding.

The Court: Now, just a minute. You have now got all the records after November the first, and you have had them

for some time. I don't know what those records disclose, and I am interested, but if they disclose dishonesty, sharpshooting, and reprehensible conduct, they should have been presented to a Federal grand jury, and have this man indicted if he has done anything wrong. If he has done anything wrong, I will be the first one to approve of that kind of investigation.

Now, I am called upon to determine at some time whether these are claims contracts or services that were supposed to be rendered under the general contract.

Mr. Pittle: Well, sometimes it is quite likely or frequent that criminal litigation arises out of civil litigation.

The Court: That is one of the reasons why I think I asked the question. This matter could have been put before the Council of 74 members and let them determine whether there was anything wrong with what this man did.

All right let us proceed.

Other than that, I suggest that if he has done anything wrong, if he has violated his oath as a lawyer, let
626 them take him before the American Bar Association, or our Grievance Committee, and we have a pretty good Grievance Committee.

Mr. Pittle: Your Honor, we will put in evidence that that was done.

The Court: Well, I don't know anything about that. I am saying what you can do.

Mr. Pittle: Well, I am trying to answer your question.

The Witness: Let me complete my answer, but before I do so, I would say that I would welcome that, Your Honor.

The Court: Well, if you have done anything wrong, I think it should be done.

The Witness: Of course, it should be done. I will welcome the opportunity to appear before the Grievance Committee and go into these things with knowledgeable people.

By Mr. Pittle:

Q. Fortunately, I have no province in that area. I am here to ascertain the facts in this case, and I am trying to ask you some questions.

The Court: All right, let us proceed now.

The Witness: I will finish my answer to your question, that Healing against Jones has been adjudicated in the Office of Interior as a claims case, on the basis of a thorough discussion of the minutes, in the minutes, and the other records which make it clear that that is what it was.

627 By Mr. Pittle:

Q. Yes, Mr. Littell, we know that the Secretary of the Interior and the Commissioner approved everything you did. We have done that. We have got the documents

But you know, do you not, that as soon as the complaints were submitted under Mr. Nakai's government the matter was looked into again, and that is why we are in Court today. Isn't that correct? A. No. Mr. Pittle, the Secretary of the Interior and the Commissioner of Indian Affairs did not approve everything I did. We have lots of differences in which I was overruled, and I don't know why you could make a statement like that.

But they did approve these contracts, and their signatures are on them after careful review by the Legal Department, and they also approved budget after budget, and voucher after voucher, for a period of years showing Healing against Jones expenses as a claims case.

Q. Yes, sir. Now, are you telling us in substance under your contract that whenever you decided as General Counsel and Claims Attorney that any particular case was in fact a claims case that it becomes a claims case because you decide it? A. No, I certainly do not, and it has always been subject to challenge, and I invite a challenge at any time on that subject.

628 I have dealt with complete forthrightness with the

Tribe in this and every other respect, and I would welcome any question on that matter.

Q. All right, sir.

As General Counsel for the Navajo Tribe, you had under your supervision from time to time various other attorneys to assist you; is that correct? A. Yes.

Q. And each one became a signatory and party to the contract upon appropriate amendment authorizing their employment? A. Yes.

Q. And these attorneys were authorized to work on General Counsel services exclusively, except for Mr. Alexander in 1957? A. Yes.

Q. And except for Mr. McPherson and Mr. Wolf in 1960; is that correct? A. Yes. It is correct with qualification, but there is no black and white here, there is a gray area, counsel.

Q. All right, let us find out about the gray area. Tell me about it. What do you mean by the gray area? A. I mean this, that you are dealing here with the greatest title problems of the whole West of the United States, and they evolved suddenly and burst into tremendous complexity and significance with the development of large oil
629 and gas resources, beginning at the end of 1946 and going into 1947, when we had successive bids of quite a number of millions of dollars, something approaching \$30 million in four successive bids—

Q. Bids by whom, sir? A. Bids by oil companies for oil and gas leases on the Navajo Reservation.

Now, there is nothing that cures title problems, as the oil field saying goes, like a dry well; and there is nothing that creates one like a wet one.

You suddenly have created here, unprecedented in Indian history, notwithstanding the discovery of oil in Oklahoma, a brand new series of problems, which I shall demonstrate by maps when I get to my statement.

Q. You will have the opportunity. A. Across the whole northern end of the Navajo Reservation in Utah, in various Executive Order areas, and as simply as I can, let me say that all of these problems were at the outset General Counsel problems.

Q. When did they become claims cases? A. I will now answer that.

Your exhibit, for example, if I may be concrete about it—what was the number of that exhibit with all the cases listed and testified to by the accountant?

Mr. Wiener: The tabulations were Defendant's Exhibits 10 through 13 inclusive.

The Witness: I have never seen them.

By Mr. Pittle:

Q. You have never seen them? What? A. I have never seen the tabulations, but I know what is wrong with them. I will now tell you.

Q. Before you go into that, just answer the question I asked you.

Mr. Wiener: The question was: Tell me about it.

By Mr. Pittle:

Q. And then when did they become claims cases?

Mr. Wiener: The witness is answering the question, Your Honor.

The Court: All right, let him answer.

The Witness: I can answer it much more easily and concrete than in general. There are over the Navajo Reservation 90 to 93 School Land Sections scattered through Arizona, New Mexico, and Utah, a rough estimate, because nobody knows, but immediately the Utah Sections became terrifically important because of the development of oil in that northern area.

Did the State of Utah have those sections or didn't it?

Now, they broke into classes, and as simply as I can state it, they were so-called delinquent school land sections, where the State traded out its school land sections right, and probably in these cases the property has never even been surveyed, and they traded that right to the Federal Government and took some land somewhere else.

Immediately that oil was discovered, Utah developed the ingenious theory, that its trading out, as far as the mineral rights was concerned, was invalid, because it had a 1919 act forbidding them of disposing of mineral interests of the State.

So immediately all the so-called relinquished sections were under attack by Utah, that they were claiming, that we have no right to trade those out, we own the minerals still.

How to test that for the Tribe?

If you care to draw out my letter from your own exhibit, my letter of July 7, 1959, I will give you explicit answers to the whole strategy of those cases.

But here is the point in essence in the greatest simplicity, as far as I can simplify the most complex title problem of the whole West, apart from one aspect of it.

My associate, Mr. McPherson, wanted me to persuade the Department of the Interior and the Justice Department to render title, to quiet title action to those sections that had been relinquished, and I think there were 15 in Utah, I can't remember exactly, and until this day we don't know exactly, the BLM says so many and Utah says so many.

In any event, I helped persuade the Department
632 of Justice and helped prepare the case to bring a test case on two of those sections. This was General Counsel work, and we helped also to a very large extent beat Utah, the State case, because Utah attempted a left-hand run around our legal position by instituting a State case of lands outside the reservation, where they hoped to get a favorable determination in the State of Utah Supreme Court.

We helped with the presentation and the briefing of that, and Utah lost both cases, and I do not detract from the very able work of Floyd France, and whoever else helped him in the Department of Justice, but we helped them tremendously.

We supplied them with briefs, and drafted the original complaint, as I remember it, and that was Problem No. 1.

Those test cases were General Counsel cases and they meant millions of dollars to the Navajo Tribe. We settled that relinquished School Land Section case for them by these precedents: In both the State of Utah, where they sought to get a State decision in their favor, and were beaten, and in the Federal Court.

Secondly, this river bed of the San Juan River across the whole northern end of the reservation was at issue, and it shifted around.

Did the Tribe own it or did the State of Utah own it? It depended on navigability, under the Supreme Court ruling. From Chimney Creek to the Colorado boundary an area some river miles, 30 or 40 river miles, tremendously valuable land in which oil was already being pumped, and we impounded the proceeds from one of the Utah leases until the cases could be settled, and we prepared the complaint for the Department of Justice.

Now, just a minute, you have asked me a question, and I cannot go ahead and answer it—

By Mr. Pittle:

Q. I didn't ask you what work you did. I didn't ask you to make a speech.

I asked you to tell me, to answer a simple question.

Mr. Wiener: Your Honor, the question was: Tell me about it, and the witness is telling, he is answering.

The Witness: I am telling you how the claims case merged.

Now, this case also, like the School Land Sections Case, was not a claims case, although we did a very large percentage of the work.

The Court: Can't you cut the questions shorter and the answers shorter?

Mr. Pittle: My question was very simple, I thought, but the answer is something different.

The Court: Let me make this suggestion to the
634 witness, or to counsel, Mr. Wiener and Mr. Doyle.

Instead of going into a long detailed explanation, if the witness has to do it, I suppose it might be better to wait until you take him over on cross examination to develop these things.

Mr. Doyle: Yes, I think I can say this right now, Your Honor, that the Government has by those exhibits and those tabulations picked out of the time sheets of the counsel different times they worked on the Utah School Land Sections, and as we pointed out before, and the witness is going into it, nobody made any distinction at all when they made the big tabulation between what was precisely before the Secretary on 030009, which was a claims case, so we have a whole mass that he is trying to tell everybody on precisely, and what part of the Utah School Sections problem was claims and what was General Counsel.

The Court: Let me ask you something. I haven't looked at these records, I don't know what they contain, but was there any policy or regulation or anything of that nature by the Tribe indicating how these records should have been kept? Or how many hours should have been entered here as claims work and how many as General Counsel work? What was the arrangement?

Mr. Pittle: The requirement is in the statute, 25 U. S. 82, which says no money or thing of value shall be paid to any attorney or agent for an Indian tribe, et cetera,
635 except upon vouchers approved, and so forth and so on.

So in submitting their vouchers for payment, the attorney submitted a service record showing what they did, for the previous month, or previous two weeks, or two months, whatever the case may be.

The Court: Well, now, was this approved by the Interior Department?

Mr. Pittle: They received the money, they received their pay, and everything was approved down the line.

The Court: Let me read this section again. This is section 82 of Title 25 U. S. Code. It says: No money shall be paid to any agent or attorney by an officer of the United States under any such contract or agreement, other than the fees due him for services rendered thereunder.

What does that mean?

Mr. Pittle: That is according to the contract, for services previously rendered.

The Court: Would that be under the services as General Counsel?

Mr. Pittle: Depending on the terms of the contract, Your Honor.

The Court: But the moneys due the tribe, Indian or Indians, as the case may be, shall be paid by the United States, by its own officers or agents, to the party or parties entitled thereto, and no money or thing shall be paid
636 to any person for services under such contract or agreement until such person shall have first filed with the Commissioner of Indian Affairs a sworn statement showing each particular act or service under the contract, giving the date, and the facts in detail, and the Secretary of the Interior and the Commissioner of Indian Affairs shall determine therefrom whether in their judgment such contract or agreement has been complied with or fulfilled. If so, the same may be paid and if not, it shall be paid in proportion to the services rendered under the contract.

What I am trying to find out, were these forms or these time sheets, if you call them that, submitted to the Department of the Interior for their inspection, and did they approve of what was done or the payment of money in connection with work that was done?

Mr. Pittle: Yes, Your Honor, they did. Everything that was done and paid for was approved.

Now, the embarrassment of this has to be explained away by giving credit to the Secretary of the Interior, the defendant in this case, by taking the action he did when he

determined that this should not have been done, and we will argue, when the time comes, that the Secretary has the right to change his mind in any decision when he believes it should be.

The Court: Well, I am trying to follow your theory.

Mr. Pittle: Yes, it was approved, of course. If it
637 hadn't been approved, we would have a different kind of lawsuit.

The Court: Very well, let us proceed.

By Mr. Pittle:

Q. Let us go back to your General Counsel services, Mr. Littell. A. I haven't finished the answer to my question, and it answers the Judge's question, too, if I may presume to say so.

What I have been trying to show you was that all this work that you have summarized in these tabulations, and I haven't even read them, as described by your accountant, speak of the 98 per cent that I would roughly say are general—

Q. May I interrupt you at this point?

I move to strike the answer because it is not responsive to the question I asked.

I didn't ask the witness about the tabulations or anything else. I am talking about the General Counsel services.

The Court: All right, repeat the question. I have forgotten the question.

Mr. Pittle: I have forgotten the question now, too, Your Honor.

The Court: All right, just a minute.

(The last question was read by the reporter.)

638 The Court: The one before that.

Mr. Pittle: May I withdraw the question and move to strike the answer, with the understanding of what Your Honor said before is all in the record?

The Court: All right, that will be done, and I think we will get along faster.

By Mr. Pittle:

Q. Mr. Littell, in your contract, as you have stated, you were authorized to serve as both General Counsel and as Claims Attorney, and from time to time by amendment of the contract other attorneys were employed or retained by the Navajo Tribe to work under your supervision; is that correct? A. That is correct.

Q. Now, Mr. Alexander was employed as a General Counsel, to do General Counsel services and claims work, both, was he not? A. Yes.

Q. And that was in amendment with the original contract? Amendment No. 1, do you recall? A. I think that was the original contract. He was with me at that time, yes.

Q. In July of 1960, Mr. McPherson and Mr. Wolf were authorized to work on claims work, as I recall; isn't that correct? A. Yes.

639 Q. Now, your contract with respect to the supervision and services of attorneys who were employed under your supervision for general services, provided beginning with Amendment No. 1, which employed originally Mr. Wolf and Mr. McPherson, on page 51 and 52, that Joseph McPherson and Walter Wolf are hereby added as signatories to the attorney contract, as parties of the second part, provided that the said McPherson and the said Wolf are parties to the said contract for the purposes of assisting in respect to General Counsel services only and not in any respect whatsoever pertaining to claims, unless the General Counsel shall otherwise direct by written instructions to said attorneys by and with the approval of the Advisory Committee of the Navajo Tribal Council and the Commissioner of Indian Affairs.

Now, that is quite clear, is it not? A. Yes.

Q. And every amendment thereafter which employed any other attorneys contained a similar provision, restricting them exclusively to General Counsel services unless they were authorized in writing by you to work on claims, and unless they were approved for that purpose by the Advisory Committee and the Commissioner of Indian Affairs? A. Yes.

Q. Isn't that correct? A. Yes.

640 Q. And you were required by your contract to pay for assistance on claims work, that is, legal assistance, at your own expense, were you not? A. No, sir. I was required to carry the claims work.

Q. I thought that is what I asked you. A. You said I was required to pay for attorneys. No, I was not required to pay for attorneys. I did it over a period of years. I wasn't required to pay them. I wasn't required to do it.

Q. Well, let me ask you this, Mr. Littell: When you were working on claims, if you chose to have other attorneys assist you, other than Mr. Alexander, and until July, 1960, other than Mr. Wolf and Mr. McPherson, you would have to pay their services out of your own expense, wouldn't you? A. If I did, I would.

Q. That is what I said. A. I didn't say required. I said I would.

Q. And I am not trying to quibble with you. A. Well, I thought you were.

Q. Now, was Brennan ever authorized to work on claims? A. No, sir.

Q. Was a Mr. Doherty ever authorized to work on claims? A. No, sir.

Q. Was Lawrence Davis ever authorized to work on claims? A. No, sir.

641 Q. And until July, 1960, neither Mr. Wolf nor Mr. McPherson were authorized to work on claims, were they? A. That is correct.

Q. Now, your 1957 contract, as we noted earlier, on page 41 of Plaintiff's Exhibit A, lists as claims cases five claims

of the Navajo Tribe against the United States, and it describes the nature of claims that you are authorized to investigate and prosecute, does it not, generally? A. At that moment?

Q. Yes, that is on 1957. A. As of that date.

Q. Yes, and the only other claims that were put into the category of claims cases were Healing vs. Jones and the State of Utah in Amendment No. 11; is that correct? A. I believe those are the one—no, let us see, there is the Helium case. Is that in the first list?

Q. No, that is not listed. Now, when did the Helium case become in the category of a claims case, sir? The Helium case was a claims case, was it not? A. Yes, the Court of Claims, under a special jurisdictional act.

Q. Now, were there any others in addition to those five listed in your 1957 contract, the Helium case, and the two in Amendment No. 11, considered as claims cases? A. I

don't recall any other at the moment.

642 Q. Now, the fact is you directed Mr. Brennan, Mr. Doherty, Mr. Davis, Mr. Wolf, and Mr. McPherson to work on claims cases from time to time, did you not? A. Yes.

Q. And they did so, didn't they? A. Yes.

Q. And their service records, if you will see Defendant's Exhibits Numbers 4, 5, 6, and 7, are the service records which they submitted for payment of their compensation under the contract.

Are you familiar with that? A. Only generally. I haven't had time to look at these.

Q. What was the procedure in your office? Did you approve the vouchers submitted for the attorneys on your staff or was that just a formal matter? A. No, that was a pro forma matter. They filed them at Window Rock.

Q. And under the procedure of the Bureau of Indian Affairs, in order to obtain compensation, at least since 1961, they were required to submit vouchers, and even before that time they did submit vouchers and service records, did they not? A. Yes.

Q. And those records, which are Defendant's Ex-
 643 hibits 4, 5, 6, 7 and 8 are the service records and
 vouchers submitted by these General Counsel attor-
 neys for payment, are they not? A. I do not know. I
 haven't examined them.

Q. Will you take a look at them, please? A. It would take
 some time to look at them.

Q. Would you recognize them if you just look at a repre-
 sentative few?

The Court: Well, suppose we do this, to give him time to
 look these over, let us recess for lunch.

(Thereupon, at 12:20 o'clock p.m., a recess was taken
 until 1:45 o'clock p.m.)

644

AFTER RECESS

(The trial was resumed at 1:45 o'clock p.m. pursuant to
 the recess.)

Thereupon

Norman M. Littell

resumed the witness stand pursuant to the recess and tes-
 tified further as follows:

Direct Examination (resumed)

By Mr. Pittle:

Q. Mr. Littell, have you had an opportunity to examine
 the service records and the vouchers under discussion just
 before the luncheon recess? A. No, there wasn't time, but
 I accept them as what they purport to be, counsel.

Q. I want to ask you one thing further, when you fur-
 nish your attorneys with copies of those, did they show
 them to you, carbon copies? A. Yes, some of them come
 in in the mail. I must confess, with the immense burden
 of reading, I just can't read them, but I think a good many
 of them have been mailed to me.

I can't tell you whether they are all there or not or
 whether all the attorneys mailed them.

Q. All right, sir. Just before we recessed, you told us that Mr. Brennan, Mr. Doherty, and Mr. Davis were not authorized to do claims work and that Mr. Wolf and
645 Mr. McPherson were not authorized to do claims work before July, 1960; correct? A. You were speaking in terms of the contract, Mr. Pittle, were you not?

Q. Yes. A. I think they were fully authorized to do what they were directed to do but in terms of the contract they were not claims attorneys in the sense that you describe them in the contract, yes.

Q. But they were, nevertheless, assigned to work on cases which are claims cases under your own definition, were they not? A. Yes; you are confining it, of course, to the date you mentioned?

Q. Yes, of course.

Did you assign some of these attorneys, for example, Mr. Wolf, to write speeches for the Chairman from time to time? A. No. The Chairman requested anybody from time to time that he could lay his hands on to help him to put material together.

Q. For what purpose? A. Well, describing the factual conditions that surrounded the Tribe.

Q. And were these attorneys under your supervision authorized to do that, Mr. Littell? A. As far as
646 I am concerned, they were attorneys of the Navajo Tribe and under orders to perform a service, and it was a minor trivial thing, in any event, but I believe they did it.

I am not conscious of any specific orders on it, no, I don't believe I ever gave any orders on it, and I don't believe that I did.

Q. They did in fact write speeches to be used by the Chairman, Mr. Paul Jones, before various gatherings, did they not? A. I think they all helped from time to time when the Chairman had a job like that to do. His staff did most of the work but the members of the Legal Department would help.

Q. Do you know whether they ever actually wrote any political speeches for Chairman Jones? A. Not to my knowledge.

Q. Now, while the General Counsel attorneys were working on these various matters of General Counsel work, and some of the cases, that have been otherwise described, you from time to time were troubled by a lack of help in running the Legal Department, were you not? A. Enormously.

Q. And you were requesting additional assistants fairly consistently, were you not, for the legal staff?
647 A. Yes.

Q. Additional attorneys? A. Yes.

Q. Now, oil was discovered on the Navajo Reservation in 1936, I believe? A. Well, there had been an earlier discovery, counsel, in the 20's, but they said it didn't amount to a lot, and the big oil business broke in the end of 1950, and particularly in '56 and '57.

Q. By whom was oil discovered in '56 and '57, Mr. Littell? A. I haven't the slightest idea. There are several lessees that bid on oil and gas leases, and the reason I assigned that date is not that this was the date of discovery, but the date when the big oil bidding, running into millions of dollars, recognized that there was oil there.

Of course, it had been discovered before or they would not have been bidding that way.

Q. And great economic development followed the '56 and '57 discoveries; isn't that so? A. Great what?

Q. Economic development followed? A. I just don't know what you mean by that term. A lot of money came in, and more attention to roads, and more attention to
648 inviting business and developing industry, if that is what you mean. Economic development is too broad a term to know exactly what you mean in the question.

Q. Well, Mr. Littell, this is a term that you used, I believe, in the introduction to the Navajo Tribal Code which you offered, and if you will give me a moment, Your Honor, I will try to find it.

I believe it was referred to in the Tribal Code, beginning at page 144 of Plaintiff's Exhibit A—I don't find it readily.

A. I accept the term. I just didn't know how far you meant to expand it, counsel, it is all right.

Q. Well, in any event, you have been accorded, and you have accepted great credit for the economic development of the resources of the Navajo Tribe, have you not? A. I don't know that I have. From time to time people have said some kind things, but it was the Good Lord that put the oil and gas there and not Norman Littell.

Q. You didn't create the oil and gas? A. No, sir; nor the uranium or the timber.

Q. And you didn't discover it either? A. No, sir.

Q. The oil companies and other prospectors did, did they not? They did the exploration work which resulted in the discovery? A. Yes. If you are interested in my contribution, I will be glad to give it to you.

649 Q. I am sure your attorney will bring it out on his examination, sir.

I call your attention now to your affidavit, appearing on page 13 of Plaintiff's Exhibit A, and I believe it is the third paragraph, reading:

Retainers paid to attorneys at Window Rock, Arizona, are net to said attorneys, but affiant—meaning you—has paid the entire overhead expense of his office in Washington, D. C. not only for himself but for Assistant General Counsel C. J. Alexander now for Associate Tribal Attorney Leland O. Graham, provided however that in lieu of hourly charges for secretarial services on work performed in Navajo claims cases, as provided in Section 5 of the first contract, which presented burdensome accounting features for both the Tribe and the affiant, and the Bureau of Indian Affairs as well, one full time secretary was supplied to affiant's office pursuant to Section 5 (c) of the second contract—which is the '57 contract, Exhibit 2.

Affiant at present has four members of the secretarial staff in his office on a permanent basis, including the one

secretary contributed by the Navajo Tribe, and a fifth secretary for substantial periods of time due to the preparation of proposed findings and briefs in the Navajo claims case before the Indian Claims Commission, and other
 650 claims matters, as well as for General Counsel work performed by Leland O. Graham and affiant.

Affiant has carried the burden of responsibility and overhead for the presentation of Navajo claims cases for over 16 years, and no compensation whatsoever has ever been received therefor.

Now, I believe yesterday you told us that you have received something over \$700,000 as reimbursement for expenses incurred in developing and prosecuting claims cases, did you not? A. I told you exactly to the contrary.

Q. Well, then, I certainly misunderstood you. A. I think you certainly did. I said that 700,000, over 700,000, and I can give you the detail on that in due time, had been expended for all the cases over 17 years.

I received none of it. That wasn't paid to me, and over 200,000 of that was paid to Navajos who did the field work in searching out the archaeological remains of occupancy, and that detail will all be given to you. I did not receive it.

Q. Did you disburse it? A. Well, it was disbursed under my authority under the contract.

Q. That is all I am asking you, Mr. Littell. I am
 651 not quarreling with you. I didn't say that you— A.

And I am not quarreling with you, but I want to make it clear that I didn't receive it.

It has been publicly stated by Mr. Nakai that I received it.

Q. Again I am not arguing, I think it is perfectly clear.

A. I am glad it is clear. I want it to be.

Q. You did not want to leave the inference, however, did you, Mr. Littell, that you had paid out at your own expense all the costs of prosecuting and developing claims cases, did you? A. No, sir. I didn't say that. I said I paid the overhead in my office for two lawyers, with exception of

the fact that in lieu of compensation for secretarial work on claims, which any claims attorney is entitled to, we got tired of keeping a stop watch on the secretary, and the Bureau got tired of it, and everybody got tired of it, and they said: Let's make a deal, take one secretary, and forget about the stop watch on hourly services for secretaries, and that is how I got the secretary, otherwise, I wouldn't have had it.

Q. All right. Now, the Tribal election of March, 1963, as we know, resulted in the election of Chairman Nakai as Chairman of the Tribal Council.

Now, he is the executive officer of the Tribal government, isn't he? A. Yes.

Q. And we know the former Chairman, Paul Jones, was also a candidate; is that correct? A. Yes.

Q. And Same Billison was a candidate? A. Yes.

Q. And you know that both Nakai and Billison campaigned on a platform, which among other things pledged to terminate your contract, if either were elected; isn't that a fact? A. It is not a fact. It is wrong.

Q. What is the fact, then, Mr. Littell? A. Billison didn't campaign on termination. He said there should be more authority of the General Counsel at Window Rock.

Mr. Nakai campaigned, that was one of his issues, the termination of the General Counsel for reasons best known to himself.

Q. You heard the testimony of a number of witnesses the other day, during the past few days, some of whom, I believe, testified in substance that Mr. Billison in his campaign speeches and in his platform complained that you were interfering too extensively in the internal affairs of the Tribe? Did you hear that testimony? A. I heard the testimony, but it was grossly exaggerated and you will hear testimony otherwise, and Mr. Billison himself, if he were here, would tell you some other things about that.

Q. He is not here, though? A. He is not here.

You know, I am paying my own bills, and I cannot bring everybody down here.

I will if need be bring him down.

Q. In any event, Mr. Nakai did complain that you interfered within the internal affairs of the Tribal government to an extent which he thought was excessive, did he not?

A. I never heard one of his speeches, but I have been so advised.

Q. Now, directing your attention to page 204 of Plaintiff's Exhibit A, there is a copy of a telegram addressed to you and signed by members of the Navajo Tribal Council, whose names are given, starting out:

The following wire was dispatched to the Secretary of the Interior today, and then there is a quotation of the wire, which was sent to the Secretary of the Interior.

Will you note that, please, Mr. Littell? A. 204?

Q. Yes, sir. A. Yes.

Q. Did you draft that wire for the members of the Navajo Tribal Council? A. I did not.

654 Q. Do you know who did? A. No, I really don't.

That group got together and did it in their own way. I don't know which one of them was the most responsible.

Q. The general educational level— A. This is the first I saw of it when I got a copy of it.

Q. Oh. The general educational level of members of the Navajo Tribal Council, would you say, is about the fifth grade? A. Indeed, I would not. This has been overplayed to a point that is offensive in the extreme. They have a greater intelligence than—

Q. I am not asking for editorial comment. Will you answer the question?

The Court: All right, just a minute, gentlemen. I am not going to have any more from either one of you on this. I am not going to have any more argument, and I don't think it is necessary for either one of you to raise your voices.

One of our Judges next door heard some shouting in here this morning.

Mr. Pittle: I apologize to Your Honor.

The Witness: I do too, Your Honor. I am sorry.

Do you mind reading the question?

(The last question was read by the reporter as
655 follows:

Q. The general educational level of members of the Navajo Tribal Council, would you say, is about the fifth Grade?)

The Witness: A perfectly absurd statement, counsel.

The intelligence of the Navajo Council, whether they talk your language and mine, has greatly exceeded anything which I expected to find, and their capacity for judgment is better than some of the educated men in the Bureau who try to rule them.

By Mr. Pittle:

Q. Now, will you listen to my question again, Mr. Littell. I said the educational level. I didn't say anything about the intelligence or the intelligence quotient, and I didn't make a statement, I asked a question.

Now, will you please answer the question? Is their educational level approximately the fifth grade? A. I have answered the question to the best of my ability. I would have no way of knowing how they would average off on the grades.

I thought you were referring to the intelligence level of the fifth grade. That is what I thought you meant.

Q. No, I now make it clear that I am not. Is that clear now? A. It is now clear and my answer still stands.

656 Q. Mr. Nakai was inaugurated as Chairman of the Tribal Council in April, 1963. When did your relations with him break down, Mr. Littell? A. Not until June.

Q. What happened then? A. What happened then was a disagreement over a basic legal matter, as to the proposed ordinance for the Navajo Housing Authority.

Q. Mr. Nakai advocated public housing supported by grant or loan from Public Housing Authorities and a creating of a Navajo Housing Authority; is that correct?

A. That is right.

Q. And you opposed that proposal? A. I did not.

Q. Well, what disagreement resulted from this? A. Like everything else, in fundamental character, the basic instruments bypassed the Legal Department, and where they were prepared and of course, I know now they were prepared by Richard Schifter, who was brought out to discuss it, and whom I never met, and who never called upon me, but when the ordinance was finally brought to the Council, it had provisions in it, and this again involved a complex legal problem, in which I merely wanted my legal position as General Counsel to be known to the Tribe, what they were risking.

Briefly speaking, as presented to the council, it
657 was that they would set up a Navajo Housing Authority, exercising what they regarded as the sovereign power of the Tribe to do this, with the attributes of a corporation, in this respect, that there could be limited liability that is, liability confined to the Housing Authority, which was to be composed and was in fact duly composed of Navajo Councilmen as a Board of Directors, with the Chairman and Vice Chairman as ex officio—

Q. Let me interrupt you just here. Is this your proposal that you are talking about? A. No, sir, it is theirs.

Q. All right. A. Now, ostensibly, outwardly, the function of this sudden creation of the Housing Authority, which incidentally was the first resolution that he offered to the Council, as I have been advised, that is, the resolution authorizing this creation of the Housing Authority, ostensibly the purpose was to get low-cost housing.

My objection to the ordinance as submitted was, of course, not to the housing, that is a good idea, but the objection was to get the bond issue provided in the low-cost housing act, that they had to submit to suit, and I

contended this was an effort of the Tribe to waive sovereign immunity, on the part of the Tribe, because if a judge was confined with a substantial judgment, waiving all technical questions of jurisdiction, against the Housing Authority and he looked at this penniless Housing Authority, and it always would be penniless because the money is spent on houses, not on Tribal land, and not in the treasury, and then look behind it to the Navajo treasury of \$80,000,000, who would say this Housing Authority is a mere Committee of the Navajo Tribe.

Now, I also qualified my position, in a confidential discussion of the General Counsel with his client, to say that I would take exactly the opposite position in Court, and I would fight for the contention that they had the power to create this sovereign, but they had no statutory authority to do it, and as Mr. Hedges whom the Commissioner sent out to help put this over, admitted to me that there was no statutory authority, and the risk was there.

I was doing my duty to point out the risk.

Q. All right, sir. Now, let me ask you one or two questions about your last statement.

First, after Mr. Nakai became inaugurated, did he approach you or any members of the Navajo Tribal Council or the Advisory Committee with respect to organizing a Navajo Housing Authority and obtaining low-cost housing under the Federal program? A. Not me. I was never consulted with the Advisory Committee and never in my life met with his Advisory Committee.

Q. And your objection to the manner in which this was done, as you have expressed, among other things, was that it would be an attempt or effort on the part of the Tribe to submit to suit? Is that what you said? A. I pointed out this risk, Mr. Pittle, and I pointed out one other thing that I haven't mentioned.

There wasn't the hurry that Mr. Schifter said that there was and that Mr. Nakai said that there was, because I flew back to Washington about June 12th, along in there,

and I went immediately to the Deputy Administrator of Housing to ask if we had to have this immediately as it had been presented, or you might lose the allocation of a hundred housing units, or whatever the number was, I forget, if the Tribe didn't act immediately.

And he said: Absolutely not, you have all the time in the world.

I explained the sovereign problem, and I even went over to the Bureau, and Mr. Hayden and I, the Commissioner's own attorney, agreed upon a substitute formula which would avoid this entire risk of submitting to sovereign immunity, and Hayden agreed with me that it should be in there.

Q. And the Tribal Council, however, did not agree with you, did they? A. Just a minute, Mr. Pittle. I sent the Chairman a telegram, and I will give you a copy of that telegram.

Q. Will you answer my question? A. I am answering your question, and I wanted this to be conveyed to the Council, on June 14th.

And what did Mr. Nakai do? He met in the office, in his office, and they adjourned the Council in the morning, and this was the tenth issue before the Council, and he met in his office, and they adjourned the Council, and met in his office to see if they could find a compromise formula.

Mr. Barry DeRose was there. Mr. Wurtzel was there, and it was agreed that the subject was so complicated, as sovereign immunity indeed is.

Q. Were you at that conference you are talking about? A. No, sir, I was in Washington, but I am telling you what happened, and you have got it in the testimony here, and they agreed that Nakai would go back and adjourn the Council, and this was all to be made perfectly clear, and my telegram reached him on that day, but it was never given to the Council.

Q. Now, how do you know about this meeting that you are talking about when you were in Washington, Mr.

Littell, and you were not there? A. I know about it because, as will be fully described by a subsequent witness, it will be testified to, and here is a copy of the telegram, and if this is the appropriate time to put it in the record, it is pertinent now, and I ask my counsel.

Q. Your counsel may do it at the appropriate
661 time. A. Very well.

But this telegram was never conveyed to the Council. They never had the advice of their General Counsel.

He went back to the Council and they voted the ordinance with their leadership in his office, waiting for him to return.

Q. All right, accepting all this hearsay testimony, I understand.

Now, I ask you my question: After everything you did, and after all the objections you made the Tribal Council created the Navajo Housing Authority against your recommendation, did they not? A. In spite of it, on this particular point; that is right.

Q. Now, isn't that a matter of policy to be set by the Tribal government and not by the General Counsel? A. Absolutely, and I will now do anything at all to help that Authority, that I had never been called upon or been consulted about at all.

Q. Yes. A. On that one clause, and the fact that they didn't need to hurry, and the fact that it was rushed through, with the real objective to employ these other counsel, and that was the real objective.

Q. Yes, sir. A. That was rushed through. Those
662 two things I objected to, because that is not the way we did business in the past, and it is not the way an attorney should do business with his client, and once it was settled, and the client had decided it, that is Tribal policy, and I am for it.

Q. I think you have made your position clear. Thank you.

Now, in your affidavit, on page 15 of Plaintiff's Exhibit A, beginning on the bottom of page 14, it reads:

Both before and after the inauguration of Raymond Nakai, you say, other attorneys were almost continuously present at Window Rock conferring with the Chairman, Vice Chairman Damon, and members of the Advisory Committee of the Council selected by Chairman Nakai. These were principally Richard Schifter, a member of the firm of Strasser, Spiegelburg, Fried, Frank & Kampelman of Washington, D. C., an associate of that firm, one Allen Wurtzel, and Barry DeRose, an attorney from Globe, Arizona.

Said attorneys at no time called upon the General Counsel or any member of the legal staff, with the exception of one instance in which Allen Wurtzel asked tribal attorney Walter Wolf as to whether a resolution he was drafting for the Advisory Committee of the Navajo Tribal Council was consistent with Tribal law.

And then the next statement: One or more of
663 said attorneys attended secret meetings of the Advisory Committee and advised the officers and members of the Committee.

Now, this is your affidavit, Mr. Littell. How do you know those meetings were secret? A. I didn't hear your question. How do you know what?

Q. That those meetings were secret meetings, one or more secret meetings? A. Well, because no minutes were ever made in accordance with the practice of the Tribe, which we had always followed in the past.

We never received minutes, and we know the people that attended them because Schifter was seen walking over a back trail in the dark of night—

Q. Did you see him? A. No, but one of the witnesses did.

Q. I think you have answered my question. A. I have answered it.

Q. Now, are we to understand— A. Furthermore, I can accept the testimony here, can't I? Mr. Barry DeRose testified to this.

Q. I am asking you, Mr. Littell, how do you know. I will ask other witnesses how they know. A. I stand corrected.

Q. Now, listen carefully, are we to understand that you contend that the Tribal officers did not have the
664 right to consult other attorneys? A. On Tribal business they should have consulted the General Counsel.

Q. You were their attorney exclusively? A. This has been the policy of the Indian Bureau from time immemorial, as far as I know.

Q. I am not asking you about the policy of the Indian Bureau, but I am asking you your opinion and your understanding of your rights under the contract. A. On all fundamental matters pertaining to the rights of the Tribe, the General Counsel and the accepted legal staff should be consulted, no matter what other advice was brought in. I have always welcomed other legal advice, and I told Paul Jones, his predecessor, to get legal advice wherever he can get it, but on these fundamental matters, you should come back and let us see what the proposition looks like, and this is an excellent example of it.

Q. All right, sir. You are the exclusive attorney for the Navajo Tribe, so you believe.

Now, you are not required to work for the Navajo Tribe exclusively, though, are you? A. No, sir.

Q. You may in fact have other accounts or other clients may you not? A. I used to have quite a few, counsel,
665 when I first undertook this work, and carried the Navajos on this sort of work, but now it has been omnifarious, it has been just all devouring. I mean, it is practically eating me up.

Q. Do I understand you do not have any other clients? A. No, you do not. I will never give myself totally to one client. I have just exactly three last year, and one of them was very de minimus. No client will own me completely, but the Navajos almost did.

Q. Now, in your affidavit, on page 15 of Plaintiff's Exhibit A, you say:

The Commissioner of Indian Affairs, the Solicitor, the Secretary of the Interior, received and conferred with Chairman Nakai and a delegation of his associates together with attorneys Barry DeRose from Globe, Arizona—

A. Excuse me, counsel, where are you reading from?

Q. Page 15, next to the last paragraph. It states: Barry DeRose from Globe, Arizona, and Richard Schifter from the aforementioned firm in Washington, D. C., on numerous occasions both before and after the inauguration of Chairman Nakai on April 13th.

Now, how did you know that at the time you wrote your affidavit, Mr. Littell? A. Because I was advised by lawyers who know the Schifter firm that this was true, and the Commissioner of Indian Affairs in conversation told me

the same thing, and he called on Schifter before he
666 had even called on the Commissioner of Indian Affairs.

Q. Do you believe that there is anything inherently wrong with the Secretary receiving a delegation of Tribal officers and other attorneys to discuss Tribal matters without your presence? A. No; just a question of judgment.

Q. But not your judgment; is that correct?

The Court: Well, I would not go into that. What is the next question?

Mr. Pittle: Strike that, please.

By Mr. Pittle:

Q. Now, at the top of page 16, in the same affidavit, in Plaintiff's Exhibit A, you refer to, that the purpose of the trip was to terminate the employment of the Tribe's General Counsel.

You say: Leaders of the Tribal Council thereupon sent a telegram of protest to the Secretary of the Interior.

Now, I ask you who are the leaders of the Tribal Council that you are referring to there, Mr. Littell? A. Well, Annie Wauneka would be one of them, and there were many that were associated in this group in the Tribal Council.

Q. Now, these are your personal supporters and followers in the Council; is that correct, these particular leaders? A. Well, not necessarily that. They are
 667 some of those who come to me for advice on the Tribal Code and the Tribal law, and what has gone wrong here, as far as the law of the Tribe is concerned.

Q. Are all these leaders, whoever they may be, or whoever you refer to, opposed political to Chairman Nakai's administration or to the Chairman personally, if you know?

A. Those that sent the telegram were, but the group has steadily grown to include his own supporters.

Q. I am talking about the group of leaders who signed this telegram, Annie Wauneka, for example? A. Yes.

Q. She was a member of the Tribal Council? A. Yes.

Q. She had been a member of the Advisory Committee for many years, had she not? A. I believe she had, yes.

Q. Did she receive the salary as a member of the Advisory Committee? A. You will have to ask her that. I can't remember about that.

Q. You don't know whether the Advisory Committee members receive any salary? A. Well, they receive, I think just like Council men, on a per diem basis, what days
 668 they put in, I am quite sure this is correct.

Q. And Mrs. Wauneka was a member of various important Committees established and created by the Tribal Chairman in the Council also, was she not? By Mr. Nakai? A. I am not aware of any except Chairman of the Health Committee.

Q. As such, did she receive a salary? A. No, I am sure she did not. I think the Committee men just get days of service, and their travel expenses. I am quite sure that is correct. I will double check to be sure.

Q. But with the inauguration of Mr. Nakai's administration Mrs. Wauneka lost her position on the Advisory Committee, didn't she? A. Yes. It may seem strange to you, but I cannot tell you at this minute that she was on that old Committee.

If she was, maybe you can tell me. I have now already forgotten who the members were.

Q. You are testifying, and you are an attorney— A. Yes, I should know, I admit it.

Q. Do you know whether or not she lost her position as Chairman of the Committee you mentioned after Mr. Nakai's inauguration? A. No.

Q. You don't know? A. No; she resigned from
669 it, recently.

Q. How recently? A. Well, when she was elected to this Advisory Committee in October, the present Advisory Committee which the Secretary finally approved on October 7th, it was agreed that they should not serve, members of the Advisory Committee should not serve on other committees because they didn't have the time.

Q. All right, sir, now on page 17 of your affidavit, in Plaintiff's Exhibit A, you make the statement that—I believe it is page 17, I will find it, pardon me just a moment.

Do you recall your statement in your affidavit—I am not able to pin point it at the moment—that the Commissioner of Indian Affairs backed Schifter for his employment as counsel to the Navajo Housing Authority? A. You mean, that I reported that Schifter backed the Commissioner for appointment as Commissioner?

Q. Oh, I have found it now. A. That is what it says at the bottom of page 17.

Q. At the bottom of page 17, the entire sentence, if I can find the beginning of it.

This is it: Affiant explained fully the posture of claims proceedings before the Indian Claims Commission, the schedule of dates for the filing of proposed findings and briefs of the conflicts between the Navajo land claim and those of surrounding tribes, and how affiant had
670 combed over the Bar in Washington to find any man of experience to replace Mr. McPherson, who had resigned for reasons of health, and Mr. Marvin J. Somon-

sky, whom affiant had retained in 1954 to assist but had to release because of his presence in the Schifter firm after this bewildering conflict had arisen with the Commissioner's backing of Richard Schifter for the legal work on the Navajo Reservation.

Now, you are complaining there about the Commissioner's backing of Schifter for employment as counsel for the Navajo Housing Authority, are you not? A. I think he had much wider scope in mind, yes, but that was the immediate matter, but that was how the camel got into the Arab's tent.

Q. Now, how do you know that the Commissioner backed Richard Schifter for employment with the Navajos? A. Because of his completely apathetic attitude.

Q. Whose? A. The Commissioner's.

Q. Yes. A. Up to about in May, sometime, we were on completely normal speaking terms and relations, and the way he backed away from the fact that Schifter would be possibly entertained out there. So that is the Chairman's business.

Of course, he said, when it comes to invading the official attorney's contract relations with the Tribe, that
671 is something else again, and I would have to look at that.

Q. Is that what you mean by the Commissioner's apathetic attitude, to use the word you just used? A. I suggested to him in the spirit of being constructive, and wishing to get the Chairman's advice, as I did, from April 15th to May 13th, in a very constructive and satisfactory way of the advisability of the Chairman coming to the office of the General Counsel to review the massive accumulation of documents in evidence on claims, and what we were doing, and the general process of the General Counsel's office.

He was not in the slightest degree interested in urging the Chairman to do that. The Chairman went to Schifter's office on more than one occasion, on several occasions, and

there was never what he called a courtesy call on the secretary, and there was never even a courtesy call on the General Counsel, which even if I had been the blackest of the black, you would have thought he would have wanted to see whether my horns grew forward or backward, and find out what lay behind his massive legal work for the Navajo Tribe, and that was a lesson, and the Commissioner did not help, and he didn't raise a finger, and that is what I describe as an apathetic attitude toward the whole thing.

Q. This is what you mean by the Commissioner's backing of Schifter's employment? A. Yes, I think it is more
672 concrete than that, but that is what I got from it.

Q. You know, of course, that Schifter has never been employed by the Navajo Tribe? A. Well, he is employed now.

Q. He is in fact employed by the Navajo Tribal Housing Authority, is he not? A. Yes, but that is a subterfuge.

Q. That is a subterfuge? A. Yes.

Q. But that is not the Navajo Tribe, and the subterfuge is your conclusion; is that right? A. There is a great danger that it will be held the Navajo Tribe, and that is why I am afraid of it.

Q. Mr. Littell, again I don't want to start an argument, but may I have an answer yes or no? A. Not official for the Navajo Tribe, that would have to go before the Council, and that he did not wish to do.

Q. All right, again, that is your opinion, isn't that so? A. It definitely is.

Q. And the fact that you say that the Navajo Tribal Housing Authority employment of Schifter is a subterfuge, again is your opinion, is it not? A. It certainly is, my very
673 strong opinion, although the Housing Authority is a necessity, and it should be carried through successfully.

Q. You know, of course, that Schifter was never submitted a contract employing him as attorney for approval to the Commissioner of Indian Affairs, do you not?

A. Another subterfuge; they submitted a consultant's contract which is before you.

Q. Your answer is that you know that he has not? A. I know that he has.

Q. He has submitted it? A. Well, I know that it has been submitted. I don't know that he personally carried it over, but that 90-day consultant contract—I can't remember the exhibit number. Do you remember, counsel? A. It was submitted and was defended by Frank Barry.

Q. Now, I am going to ask you to tell me what you base your knowledge on that Mr. Shifter's contract was submitted to the Commissioner of Indian Affairs for approval. A. I will be happy to tell you.

Q. All right, go ahead. A. When I consulted with the Secretary of the Interior about this shocking telegram of June 25th delivered to the press before it reached the Secretary, and he sent for me, and we had a very long conference, and I raised the question—

Q. When was that, sir? A. That was June 25th 674 and 26th.

Q. You conferred with the Secretary? A. Yes. It might have been the 26th and 27th. I have to check my notes.

I think it was June 25th and 26th, and we had a very long conference indeed, and I think it was nearly an hour and a half.

Q. All right. A. And he agreed that Shifter would not be employed on the Navajo Reservation.

Q. Who did, the Secretary? A. The Secretary, and I explained what had been done in this Barry DeRose and Shifter operation, with Wurtzel there too, and I have a very extensive, specific memorandum written immediately after that, if there is any need to go into that much detail, and he said to see Mr.— and one of the complaints, trying to narrow my answer to your specific question, much was discussed in that interview, and trying to narrow my answer, I raised the point of the subterfuge of the 90-day

consultant contract as an invasion of the attorney regulations and law requiring it to go before the Council, a thousand dollars apiece for Shifter, and a thousand dollars apiece for Barry DeRose, with their expenses, as consultants.

I had drafted that resolution and I knew what the purpose of it was, the resolution authorizing consultants, and this was completely outside of the realm of the
675 consultants in wildlife, or fire control or pest control, although that might have had some application.

But in any event, it was completely outside of the realm of consultant's business, and I laid this on the Secretary's table in our discussions, as an example, in addition to the housing, which I am not now discussing, of the attempt to work these boys in, and then get them on the payroll.

And he said, take this—this is your question, counsel—and he said take it up with Mr. Barry.

Now, how do I know it was submitted? Because when I saw Mr. Frank Barry the next day, well, again, we will not submit a document in my own testimony, but I discussed this very matter with Frank Barry.

Oh, he said, that 90-day contract, that is almost half run now. He downgraded it as immaterial, after all, a 90-day contract for the consultants was nothing.

He knew about it, he discussed it intelligently and dismissed it. That is how I know it reached the Secretary's office, but I made it so hot for them, they didn't approve it.

Q. Did Mr. Barry or the Secretary or anyone else in the Bureau of Indian Affairs or the Department of the Interior tell you that Mr. Shifter's contract had been submitted for approval by the Commissioner? A. No, but that conversation with the Solicitor was enough for me to admit
676 that he had it.

Q. You concluded that he had it from that conversation? A. Yes, I did, because he knew all about it.

Q. Now, you mentioned that the Secretary told you that he would not approve Mr. Shifter's employment? Is that what you said? A. Yes, sir.

A. Another subterfuge; they submitted a consultant's contract which is before you.

Q. Your answer is that you know that he has not? A. I know that he has.

Q. He has submitted it? A. Well, I know that it has been submitted. I don't know that he personally carried it over, but that 90-day consultant contract—I can't remember the exhibit number. Do you remember, counsel? A. It was submitted and was defended by Frank Barry.

Q. Now, I am going to ask you to tell me what you base your knowledge on that Mr. Shifter's contract was submitted to the Commissioner of Indian Affairs for approval. A. I will be happy to tell you.

Q. All right, go ahead. A. When I consulted with the Secretary of the Interior about this shocking telegram of June 25th delivered to the press before it reached the Secretary, and he sent for me, and we had a very long conference, and I raised the question—

Q. When was that, sir? A. That was June 25th
674 and 26th.

Q. You conferred with the Secretary? A. Yes. It might have been the 26th and 27th. I have to check my notes.

I think it was June 25th and 26th, and we had a very long conference indeed, and I think it was nearly an hour and a half.

Q. All right. A. And he agreed that Shifter would not be employed on the Navajo Reservation.

Q. Who did, the Secretary? A. The Secretary, and I explained what had been done in this Barry DeRose and Shifter operation, with Wurtzel there too, and I have a very extensive, specific memorandum written immediately after that, if there is any need to go into that much detail, and he said to see Mr.— and one of the complaints, trying to narrow my answer to your specific question, much was discussed in that interview, and trying to narrow my answer, I raised the point of the subterfuge of the 90-day

consultant contract as an invasion of the attorney regulations and law requiring it to go before the Council, a thousand dollars apiece for Shifter, and a thousand dollars apiece for Barry DeRose, with their expenses, as consultants.

I had drafted that resolution and I knew what the purpose of it was, the resolution authorizing consultants, and this was completely outside of the realm of the
675 consultants in wildlife, or fire control or pest control, although that might have had some application.

But in any event, it was completely outside of the realm of consultant's business, and I laid this on the Secretary's table in our discussions, as an example, in addition to the housing, which I am not now discussing, of the attempt to work these boys in, and then get them on the payroll.

And he said, take this—this is your question, counsel—and he said take it up with Mr. Barry.

Now, how do I know it was submitted? Because when I saw Mr. Frank Barry the next day, well, again, we will not submit a document in my own testimony, but I discussed this very matter with Frank Barry.

Oh, he said, that 90-day contract, that is almost half run now. He downgraded it as immaterial, after all, a 90-day contract for the consultants was nothing.

He knew about it, he discussed it intelligently and dismissed it. That is how I know it reached the Secretary's office, but I made it so hot for them, they didn't approve it.

Q. Did Mr. Barry or the Secretary or anyone else in the Bureau of Indian Affairs or the Department of the Interior tell you that Mr. Shifter's contract had been submitted for approval by the Commissioner? A. No, but that conversation with the Solicitor was enough for me to admit
676 that he had it.

Q. You concluded that he had it from that conversation? A. Yes, I did, because he knew all about it.

Q. Now, you mentioned that the Secretary told you that he would not approve Mr. Shifter's employment? Is that what you said? A. Yes, sir.

Q. Did he not in fact tell you that he did not desire to have any Washington attorney represent the Navajos in connection with the housing project at Window Rock, Arizona? Isn't that what he said? A. No, he did not. He said personally it applied to Mr. Schifter.

Q. Why didn't he want to approve Mr. Schifter's employment? Did he tell you that? A. He said that Mr. Schifter would not be on the Navajo Reservation, employed there.

Q. Why would he not be on the reservation? I am not quite sure I am following you. A. Well, counsel, ask the Secretary.

Q. I shall do that, and he will testify, and that is why I am asking you now. A. That will be fine. He made it very clear, and I shall be interested to hear.

Q. That he would not approve Mr. Mr. Schifter? A. 677 Yes, sir; and take up the legal details on how to unscramble this with Barry.

Q. Did the Secretary give you a reason why he would not approve him? A. He said that there were other reasons, and implied that there were deep other reasons why he did not want him employed there.

Q. But you only know from your own inference that Mr. Schifter's contract was submitted to Washington for approval by the Commissioner? A. That is the only way I know it. I know that it was signed and sealed.

Q. Sir? A. I know that it was signed and sealed, and I just assumed, until this minute, I have assumed it was there because of Frank Barry's discussion of it.

Q. Now, turn to page 20 of Plaintiff's Exhibit A, and you have mentioned, about the middle of the page, 1 (a), with reference to whether Healing vs. Jones was properly a claims case, the following should be added:

There has been a serious argument between affiant and his Navajo clients as to compensation for claims.

And then down under (c): The case has been many times mentioned and discussed before the Council as a claims

case, a recent example being in the report of the
678 General Counsel to the Tribal Council, May 1st, 1962.

Now, in connection with the discussion of Healing vs. Jones as a claims case, I believe this morning you referred to some minutes of a meeting of the Advisory Committee? A. Yes.

Q. September 24, 1957? A. Yes.

Q. Is that correct? A. Yes.

Q. I show you Plaintiff's Exhibit K, which purports to be a copy of the minutes of the Advisory Committee meeting of September 24th, 1957, containing 66 pages, Mr. Littell, and ask you this question: Anywhere in those 66 pages is it explained to the Advisory Committee that changing the category of Healing vs. Jones to a claims case would result in your receiving 10 per cent of the value of the property which the Navajos were to recover in the case or one per cent of the minerals as a royalty? A. It certainly was.

Q. Will you show me where it was so disclosed?

I believe Mr. McCabe explained it at various places, does he not? A. I explained it.

Q. You explained it? A. Yes, I explained it.

679 Q. Where? A. On page 23—I am talking—of this Exhibit K:

Now, the next paragraph I read to you is new.

And need I explain, counsel, that this is a discussion pursuant to the interim contract, the delegation of the Advisory Committee.

Q. All right. A. So that the record is clear.

Continuing: There may well be cases to recover lands. The biggest case on the horizon is the Hopi case. If The Government denied completely your right to the Hopi area, and we have to sue and litigate for it, and if, for example, when we get the title report and other title information on the Utah lands, some of the area under oil development, we found a vacated mining claim, or some other settlers' area, which we contended should be the property of the

Tribe, and I was compelled to sue to get that back from the Government, it would fall under the language of the paragraph I read to you, beginning with page 4 under claims, and running over to page 5, and including claims arising out of the violation of Treaties between the United States and the Navajo Tribe of Indians, ratified July 25, 1868, and proclaimed August 12, 1868, and claims relating to taking of, or failure to make available to said Indians, lands which the United States is under obligation to make available to said Tribe had the legal and/or equitable right to own, possess, or use.

That is very broad language.

Q. Now, just a moment, please. I don't ask for your characterization of any writing. A. No, I am reading it.

Q. I beg your pardon. I thought you were characterizing. A. No, I am not saying anything. I am just reading. I said it back in '57.

That is very broad language and quite characteristic of Indian attorney contracts over many years. That would apply to recovery of any such lands.

Now, I would be entitled to stand on that provision as drafted. In fact, so that you will understand the matter only the General Counsel part of this contract ends August 28, 1957. The claims work goes to the end of the cases unless you terminated the contract for good cause shown. So as for claims, I need no renewal of this contract, actually.

Q. Have you finished? A. Not quite. I am trying to reach that one sentence. I thought it was right here.

I stated that so we might limit the number of years to be payable and so forth.

Let me skip the immaterial part and get to what you want.

681 It is on the next page, page 24: It must be obvious if I recover a few million dollars of oil and gas rights for you, it would be worth something in the outside world—and speaking of outside world legal practice—and

would be worth millions of dollars. I would rather sit down with you on these matters of compensation as in the past and decide what might be a fair and reasonable approach to it. You have double protection of the Commissioner, because we have to get his approval. I put all the protection in there that you could have. Suppose there is a section in the Aneth extension, which was not considered part of the reservation extension, because it had mineral rights on it, and the Government denied any interest of the Tribe, and suppose I sued and recovered that land for the Tribe. I know of no such case, but this is an illustration of the sort of thing that can arise since you have oil and gas. Under the contract, I would be entitled to 10 per cent of the value of the section. If that is good oil land, I would rather drop back with you and discuss future income, or a modest participation in the royalties, for the convenience of both of us, and it would avoid a very complicated question of what the land is worth. We spent years finding out what the Kettleman Hills field in California was worth, and it took years to litigate the value of that case, and it seems well to put that in.

In that reference, I refer to the Department of
682 Justice case, of course.

Q. All right, I think you have answered the question.

Now, there are other places where it was explained, too, but I am not asking you to point to them. Instead, I am asking you this question, Mr. Littell: That was in 1957, was it not? A. Yes.

Q. And this was before the nine-man Advisory Committee, was it not? A. Yes.

Q. And your contract was actually amended by Amendment No. 11 in 1962; isn't that correct? A. Well, wait a minute.

Q. Do you understand my question? A. I don't believe I do, counsel.

Q. Let us go back. A. Which amendment are you talking about?

Q. No. 11 was executed in 1962? A. Yes.

Q. And Amendment No. 11 contained the provision in paragraph 3 (c), which expressly designates Healing against Jones and the Navajo Tribe against the State of Utah, No. 030009 as claim cases? A. Counsel, may I be permitted to interrupt you and complete the answer to 683 the last question? It is left absolutely suspended.

Q. I am satisfied with it, and your attorney may pick it up on cross, Mr. Littell. A. Very well, you didn't reach the answer to your question of one per cent.

Q. One per cent? A. The one per cent clause.

The Court: Well, I think it is time for you gentlemen to cool off.

We will take a 15-minute recess.

(Thereupon, a short recess was had.)

By Mr. Pittle:

Q. Referring to your affidavit again, Mr. Littell, on page 20 of Plaintiff's Exhibit A, where you say that the case, referring to Healing against Jones, has been mentioned and discussed before the Tribal Council, a recent example being, in the report of the General Counsel to the Tribal Council, May 1st, 1962.

Were there any other times that you can tell us that Healing vs. Jones was discussed before the Council as a claims case? A. Surely.

Q. Can you list the times? A. May I have that?

Q. Can you just give the dates from the minutes of 684 the Tribal Council? A. Is that all you want?

Q. Yes. A. Wednesday, February 5th, 1958, Item F. I am talking and discussing the Navajo-Hopi land dispute.

Q. All right, the next one. A. Chronologically, if I may suggest it, counsel, the minutes of the Advisory Committee, Exhibit K, which we have just been discussing, mentioned it about 11 or 12 times.

The minutes of January 12th, 1960, a most exhaustive discussion, oh, beginning about page 27, if I may make this comment, for helping the record, it distinguishes between the Hopi claims case, the Fort Indian Claims Commission, and the Hopi boundary line case, and Healing against Jones.

Q. All right, at this time I just want the reference. A. At page 30, 31, and over on 40 and 41, I believe, and I think it goes further into 47 and 49, the distinction between the various cases being made there.

Q. All right, and the next time? A. On page 50. I see it mentioned again on 50.

Q. All right, and the next time? A. Mr. McPherson's discussion in '61 hits it.

Q. What date? A. June 5th through June 30 of 1951, I beg your pardon, the budget session.

685 Q. 1961? A. '61, I beg your pardon. I think that more than one place but page 837 is perhaps the main one.

February 12th to 23d, 1962, several places, at page 260, and thereafter, but principally this.

I think it is in 283, but I am not quite sure. No, I guess that is it, and that is followed by the resolution to employ Leland Graham.

Then the budget session of April 23d through May the 11th, 1962, page 260, actually my report on estimate cost of the claims work, but I believe this was presented by the Treasurer of the Tribe at that time, because it was a budget session. Yes, it was presented by the Treasurer, but I prepared this, as everybody knew and knows.

Q. Are there any others? A. Yes. April 13th through May 17, 1963, that is a budget session, after Mr. Nakai's inauguration.

My report is on page 529A. That is my summary of the budget situation.

Q. All right, sir. That is up through the approval of Amendment No. 11, which placed Healing against Jones in the category of a claims case under your contract; is that

correct? These dates you have mentioned? A. I believe so.

Q. Now, you have told us that this case of Healing vs.
686 Jones as a claims case was discussed before the Tribal Council on these various dates which you have just gave us.

Now, I ask you, on any one of those occasions was it explained to the Tribal Council that the change in the category of Healing against Jones to a claims case would result in an additional recovery by you, that is, in addition to your normal retainer, as General Counsel, of 10 per cent of the recovery or 1 per cent of the minerals? A. Well, I am quite sure it was. I would have to look again carefully, but I am quite sure it was, because this is axiomatic in claims cases, and the question came up constantly, do you get 10 per cent or what happens.

Q. All right, did you hear Mr. Young's testimony the other day of his examination of the minutes of the Tribal Council meetings? A. I did. I was astonished at it.

Q. And you heard his testimony that he made an examination of the minutes of the Tribal Council as reported from about 1957, 1958, I believe through 1963, and while he noted Heading against Jones being mentioned frequently as a claims case, and nowhere did he find the disclosure or explanation to the Tribal Council that the change in category would result in a change of your recovery under the contract? You heard that? A. I heard him say that.

I heard him make the statement, and I will in due
687 time check up on it, because these references I gave you here are plenty to show that the Council was fully cognizant at all times of this claims case situation.

Q. They wer cognizant of the fact that it was a claims case.

Now, I am not going to ask you to read any of these, your counsel may do it, but we can read the references in the minutes where you pointed them out.

And my question was not where Healing against Jones was discussed as a claims case, but my question again was:

Was there a disclosure to the Tribal Council that the change in the category would result in their paying you 10 per cent of the value of the property recovered or 1 per cent of the minerals? A. Oh, yes, and the Advisory Committee meeting, which was a delegation from the Council, had an exhaustive discussion of that.

Q. The Advisory Committee is a nine-member Committee and they had an exhaustive discussion? A. Members of the Council.

Q. You heard Mr. Young's testimony that the Tribal Council as such did not get any such disclosure, and you say that is not correct? A. No, I certainly do, but it is so generally known by the Council, who were working with us on these cases in a very wonderful way, because
688 in those days we didn't have the suspicions, and we were working in complete cooperation, and they knew it was a claims case, and these records sustain it.

Q. Incidentally, do you have an opinion as to the value of the property recovered for the Navajos in Healing vs. Jones? A. I have no idea at all and that is the reason—

Q. Do you have any idea of the number of acres of land which you say were recovered for the Navajos or equitable title to it? A. There is a very sharp division of opinion between me and the Bureau of Indian Affairs on this.

Q. What is your opinion? A. My opinion is that they have exclusive rights to 1,800,000 acres.

Q. 1,800,000 acres? A. This is in round figures.

Q. Now, I call your attention to your statement at page 170 of Plaintiff's Exhibit A, which is contained in the introductory note, to a report which you made as General Counsel through the Navajo Tribal Council on April 15, 1963. At page 170 at the bottom of the page, you state: We nevertheless consider the decision—referring to Healing vs. Jones—to be in error? A. Yes.

689 Q. And you do believe it is in error. Does that mean that you didn't recover for the Navajos as much as you thought they were entitled to? A. Counsel, I have to answer the question with an explanation.

Q. Let us have the answer and then explain it. A. The decision is completely in conflict—the various parts of the decision are completely in conflict.

Q. What you are saying then is that the conclusion of law and the judgment in the case in your opinion do not follow the findings of fact? Is that what you are saying?

A. The judgment does not follow the conclusions of the findings of fact, but even if they do, and I agree with the judgment as a lawyer, the judgment prevails, but the findings of fact and conclusions of law confirm the rights of the Navajos under the Act as of 1931, 1937, and 1958, and they cannot be moved from it without legislation or further adjudication.

Q. And what does the judgment do? A. Sir?

Q. Did you include the judgment in your statement? A. I did. I said the judgment would compel the taking of property without due process of law, yes, sir.

Q. By whom? A. That is one simple way of describing it.

690 Q. By whom? A. Well, the Government is already talking about partitioning, which would result in the expulsion or removal of some three to five thousand Navajos, and yet they admit legally that they cannot move one Navajo. They have no authority to move one Navajo. So this illustrates the conflict in the terms of the judgment, of the Government's own attorneys, in the Department of the Interior.

Q. This is the judgment of the three-judge Court you are speaking of? A. That is right.

Q. And the appeal, as you know, from a three-judge constitutional Court is to the Supreme Court; is that correct? A. That is right.

Q. And you took an appeal and what happened? A. We took an appeal, and the Secretary of the Interior resisted the appeal, and therefore we didn't get it allowed, and neither did the Hopis.

Q. Did the Secretary file a brief in opposition to the granting of the appeal? A. He filed a communication to the

Department, to the Attorney General, to file a communication or letter or communication to the Supreme Court, that he didn't care to have it appealed, which, as you know, is a matter of tremendous influence in the Supreme Court, from any head of any bureau.

691 Q. But the United States was no longer a party, were they? A. Technically speaking, I suppose you are correct, but they did it just the same. This was the policy.

Q. Yes, sir. A. And very damaging to the Navajos.

Q. Yes, sir. Now, I want to call your attention to your letter of October 23, 1963, to the Secretary of the Interior which appears on page 261 of Plaintiff's Exhibit A.

This letter is dated October 23d, 1963, and it encloses for the Secretary's information what you refer to as a report of a conversation between Mrs. Wauneka and Barry DeRose. Apparently others may have been there at some time.

Will you tell me, first, how did you obtain that report of that conversation? Did Mrs. Wauneka send it to you? A. No.

Q. Where did you get it? A. Sat down on August 7th, 1963, when we were attending the Scottsdale Conference on this very case, and on this question of partition, and she dictated that statement.

Q. Was there a recording made of the conversation, do you know? A. There was not. She doesn't need it. She has an extraordinary mind.

Q. She quotes verbatim with quotation marks; is 692 that what you mean? A. That is right. That is what she did. It is amazing, but there was no recording, I can tell you that.

Q. And there was no reporter there to take the conversation? A. No, sir, none except that newspaper reporter that Barry DeRose had there, Cavanaugh.

Q. And he did not report the conversation? A. Presumably not, no.

Q. Now, you heard Mr. DeRose's testimony just yesterday, I believe, about some of the many items or statements

that he explained, that he either did not say or that was said differently, than the reports of this amazing conversation?

Mr. Wiener: Your Honor, I think that question mistates the testimony. Mr. DeRose agreed that most of the statements attributed to him in the passages that were read, first by Mr. Pittle and then by myself, were substantially correct. And I object to the question because I submit it misstates the record.

The Court: Well, as I recall the testimony in cross examination, he agreed probably at least in substance with many of the things that were said, and it may not have been exactly the way he said it.

Mr. Pittle: And he agreed with some and denied
693 some others.

The Court: That is right. Is that your recollection?

Mr. Pittle: This was on his direct examination, and I am just asking him if he heard Mr. DeRose's statement.

The Witness: Of course, I heard it. I was sitting here.

The Court: All right, let us proceed.

By Mr. Pittle:

Q. And you were not at the conversation, were you?

A. No.

Q. All right, sir, and now I will call your attention to Amendment No. 6 to your contract, which appears at page 76 of your Exhibit A.

Paragraph 3 provides for compensation, and it amends the contract to provide: That the said General Counsel's services are to be rendered on an annual basis, but compensation to be paid therefor as herein above provided, shall be paid for the convenience of all parties in accordance with the pay roll practices of the Navajo Tribe, but in not less than 12 equal installments on the first day of each month, commencing September 1st, 1957. A. Excuse me, counsel, I can't seem to find that.

Q. Page 76 is the portion I am reading from, from Amendment No. 6. A. What paragraph?

694 Paragraph No. 3. A. Very well.

Q. Which I have just read. A. Yes.

Q. Amendment No. 6 was executed in May of 1960; is that correct? Do you note that? A. Well, whatever it says here. Apparently, yes.

Q. Now, when the present litigation commenced several of your vouchers had been unpaid, I think for the latter months of 1963? Do you recall? A. I can in a minute. I have it here some place.

Q. November, 1963, the Department of the Interior had not approved I believe it was two or three vouchers for the preceding period. A. It seems to me that it was for September, October, November and December.

Q. All right. A. You are speaking of '63? Are you sure you didn't meant '64?

Q. No. I am not asking you about '63 now. A. You are quite right; I was confused.

Q. And those vouchers were subsequently paid? A. Well, they were not paid until—

Q. After you got your preliminary injunction?
695 A. Those three vouchers were September, October,

November and December of 1963, submitted October 1st, December 30th, 1963, and January 27, 1964, and February the 20th, 1964, were paid respectively on March 9th, for two of them, the first two I have named, after 161 days delay on the first one, and 100 on the second; on November 27, 1964, after a delay of 324 days; and the one of February mailed February 20th, 1964, was paid November 27, 1964, after 275 or 80 days, I am not quite sure.

Q. All right, sir. Who paid them? A. Well, they were paid in the usual way, when they were finally paid, by the issue of a check from the Tribe.

Q. From the Tribe, drawn on funds of the Tribal government on deposit in a private bank? A. I don't remember. I think that is true. I don't remember anything about the bank.

Q. You never receive a check from the United States Treasurer for the payment of those vouchers? A. No, I certainly have not.

Q. Now, subsequently there were a number of other vouchers that were delayed, payment of which were delayed, and those have since been paid, have they not? A. The vouchers, now we have covered '63, and the vouchers for all of '64 down through December were not paid until December 31st. There was one year, one year out.

696 Q. Now, is there— A. Ranging from 272 days down to one day, December 30th, where they accommodatingly paid on that very date. When I was at Window Rock.

Q. These instances are not the first time you have had difficulty in the collection of vouchers for payment for your services and expenses; isn't that correct? A. Oh, there has never been anything in 17 years comparable to this. There was some changes.

Q. Mr. Littell, I didn't ask you to compare anything, Please listen to my question.

I said, this is not the first time you had difficulty in getting payment of your vouchers, is it? A. Yes, in any real sense. We had a change of procedures that resulted in some delay, I believe it was in 1951, when the procedures were changed somewhat, but we didn't have anything—it was a procedural matter that was ironed out.

Q. What was the cause of the delay in '60 or '61? A. I would have to go back to my file to remember. I just don't recall.

Q. Let me refresh your recollection. Do you recall that some vouchers were unapproved because they didn't specify expenses with sufficient particularity; is that correct?

A. No, I don't recall any such thing.

697 There are, through 17 years, there is an occasional disallowance, because of that reason, as you know from your own expenses, they might question a dinner or might question an airplane trip that you didn't have a re-

ceipt for, and these things are inherent in Government vouchers, but there was no general category of vouchers disapproved for that reason that I can recall.

Mr. Pittle: Will you mark these for identification?

(The documents were marked Defendant's Exhibit No. 19 for identification.)

Mr. Pittle: This is a group of letters and memoranda under cover of a letter of September 3d, 1964, addressed to the Solicitor of Interior by the Area Director.

Mr. Wiener: Let me see it, please, sir.

Mr. Pittle: I want to show it to the witness.

The Witness: Counsel, while he is looking at that, may I suggest that we did not cover expense vouchers in my statement. I merely want the deficiency to be noted. I was only talking about General Counsel vouchers.

There is another story on the expense vouchers.

By Mr. Pittle:

Q. All right, tell us the story then, Mr. Littell, about the expense vouchers?

A. Well, there are expense vouchers from one General Counsel and one Claims in April of 1964; one General Counsel and one Claims in November and October of 1964.

Q. Those are still unpaid? A. I am coming to that. I will wind them all up.

A December travel voucher for '63.

Perhaps I should take them one by one or give you this list.

The last one I mentioned, October, has not been paid, that is 96 days overdue since February 1st.

The first three I have mentioned were paid January 11, 1965, and January 8th, 1965, a delay of 260 days for the first two, and 63 for the second, on the third one, and the fourth one has not been paid to date.

Then there are travel vouchers for December, 1963, mailed from Washington in February, and that was paid January 11th, after 321 days, that was for attending the

Council meeting, and was not paid until January of this year.

The travel voucher for travel in January, submitted July, 1964, was paid January the 8th of this year, 172 days delay.

The January-February travel voucher to the Council meeting, submitted September 3d, was delayed to January the 8th of 1965, 127 days.

And the July travel voucher, submitted August 24th, paid off January the 8th, 1965, 137 days.

November and December, 1964, submitted December 699 28th was paid the same day, January the 8th, 11 days, and that gets back to the old speed.

And December and January, of course, we are now approaching this hearing, and that one was paid—that was sent January the 13th, and paid January 29th.

Q. All right, now I am asking you: This is not the first time you had difficulty with payment of vouchers, is it, Mr. Littell?

Mr. Doyle: I register an objection to this, Your Honor. It is irrelevant and beyond the scope of the issue raised in the pleadings and in the pretrial, and my friend has raised an issue generally of clean hands, and if there is any specificity to prior vouchers going through his entire range of services with the Navajo Tribe, they should have at least been specified somewhere or offered to you.

The Court: Well, just a minute. You see, if we get into all these things, I think there should have been some mention of these things in the pretrial order.

Mr. Pittle: Well, if the Court please, that is one of the main issues in the case. It is the wording in the final injunction with respect to the preliminary, which prohibited and restrained the Secretary from stopping or presenting in due course vouchers for payment of services, and so forth, and I just referred to Amendment No. 6, which required vouchers to be paid in accordance with pay

700 roll practices of the Tribe, and I am going to show

why that amendment came about, and that the difficulty that occurred here are not unique.

The Court: The difficulty that occurred are what?

Mr. Pittle: That occurred since this proceeding are not unique. It has happened before. I think it is perfectly relevant to show the entire business of the plaintiff's complaint, and it will help us with the wording of the final injunction if one should be entered.

Mr. Doyle: These were not mentioned in the pretrial, and no issue has been brought up about whether there was some argument on a prior injunction before or since, and without something ahead we know nothing.

The Court: Maybe I have given both sides too much latitude, I don't know, but we have to terminate this case some time. I am just wondering if these are not really little piece of detail that are not too important to the issues.

Mr. Pittle: May I test the witness?

The Court: If you think they are. I don't want to cut you off or stop you. But this may necessitate the other side going into each one of these matters, I don't know.

Mr. Pittle: Well, I will make an offer of proof on it before I conclude it.

The Court: Well, make an offer of proof.

701 (Thereupon, counsel approached the bench and the following occurred:)

Mr. Pittle: This shows 1960, the entire group of correspondence or letters shows in 1960 there was difficulty because the vouchers were not sufficiently detailed, and there has ensued a series of correspondence between the Area Director and the Commissioner.

The Court: Let us assume that is a fact, that the vouchers weren't in sufficient detail, and needed explanation, and things like that, and maybe there was some controversy or some argument.

Mr. Pittle: Well, it became so serious that the budget for the Navajo Tribe was held up until the plaintiff agreed to conform to pay roll practices.

The Court: Was this done at the Interior Department?

Mr. Pittle: This is the Area Director.

The Court: What would it prove?

Mr. Pittle: It would prove that the plaintiff was required to submit all vouchers for payment, and they are submitted first to the Chairman of the Council, and if he approves, he send them to the Interior Department, and they send them back, and he pays them.

Mr. Weiner: Well, we agree to that.

The Court: They agree to that. It will save a lot of time.

Let us proceed.

702 (Thereupon, counsel resumed their places in the courtroom and the following occurred:)

The Court: You gentlemen have agreed to that, that will shorten the matter.

By Mr. Pittle:

Q. Mr. Littell, I show you Plaintiff's Exhibit U for identification and call your attention to section Roman IV, which purports to be a letter of October the 4th, 1963, addressed to Congressman James A. Haley, Chairman, Subcommittee on Indian Affairs, and it is ten pages long, and it is signed by members of the Navajo Tribal Council, Annie Wauneka, Harold Drake, Roger Davis, and Pete Riggs.

Are you familiar with that letter, Mr. Littell? A. Yes.

Q. Did you draft it? A. No, sir; I helped draft it.

Q. You helped draft it? A. Yes.

Q. Was the rough draft submitted to you? A. To the best of my recollection, in this maner, that I took notes of instructions on what was to be in it, and rough drafts of ideas that would go in it, and then smoothed it out, but it was basically the draftsmanship of the people who signed it.

Q. Were any of the ideas incorporated in it suggested by you to these members of the Tribal

703

Council? A. I would have to go over it to see whether any of them were.

Q. While you are doing that, sir, will you also look to see if you agree with the statements that are made and the recommendations and requests made in that ten-page letter? A. For example, the first of the Negro teachers in Navajo schools is brand new to me. I never heard that they had that objection. The difficulty of pronunciation from the oversupply of Negro instructors. I didn't know that was a focal point on the reservation, although I had seen some articles.

This civil rights on the Navajo Reservation was a matter of constant discussion by the Council members. It came to me as to whether the Navajo Code was being violated, and whether the powers specified in the Code were legally exercised.

Q. Anything further? A. Well, I would have to read it. I haven't read this for a long time, counsel.

Q. Well, just go ahead and read it, please. A. Very well, I will be happy to.

The Court: How many pages are there?

Mr. Pittle: Ten pages.

The Court: Can't you agree to this: Can't he read
704 this tonight and return tomorrow morning?

Mr. Pittle: If he wants to do that.

The Court: And go on to something else.

Mr. Pittle: All right, I reserve the right to come back to this.

The Court: All right, you may do that.

Mr. Pittle: I only have one other matter, and will you mark this for identification as Defendant's Exhibit 20, being a statement of Norman Littell in the decision of the United States Court of Appeals on August 13th, 1964, Norman Littell against Udall.

(The document was marked Defendant's Exhibit No. 20 for identification.)

By Mr. Pittle:

Q. I show you Defendant's Exhibit 20 for identification, Mr. Littell, and ask you if this is the statement you released to the press on or about the time of the decision of the Court of Appeals in the appeal from the preliminary injunction? A. I will have to read this through, too.

Q. Well, I think that will take a moment. I think you will recognize your fine hand. A. It looks familiar. Without further detailed reading, I think this is true.

Q. I have one or two questions to ask about it.

705 Calling your attention to the last paragraph on the first page, your statement, his purposes were dual, referring to the Secretary of the Interior, his purposes were dual, first to capture for political purposes the retainer business of the Navajo Legal Department for his former campaign manager in Arizona, Barry DeRose, and other politically acceptable attorneys in Arizona and New Mexico.

Udall frankly admitted to me: "I am politically indebted to Barry DeRose. He put me over in the State Convention when running for Congress."

Now, I ask you, When did Mr. Udall frankly admit that to you, Mr. Littell? A. In the conference I referred to of either the 25th or the 26th, or 26 and 27th of June.

Q. Was anyone else present at that conference besides you and Mr. Udall? A. No.

Q. There was not? A. No.

Q. Did you make any notes of the conference? A. Yes, I dictated them that very night or the next day. I would have to look at the calendar to see which day it was.

Q. Now, I ask you two other questions. How do you know Mr. DeRose was Mr. Udall's campaign manager?

706 A. He told me in so many words that he was politically indebted to him for putting him over in the Convention.

Q. Did he tell you— A. And he is a long-time personal friend. He said it more than once, and once he said: Don't attack Mr. DeRose, he is a friend of mine, and don't attack him.

Q. Again I ask you, How do you know Mr. DeRose was Mr. Udall's campaign manager? A. I don't know anything that the Secretary didn't tell me. Of course, I have heard that he was, but that is beside the point.

Q. Did the Secretary tell you that DeRose had been his campaign manager? A. That is my understanding of what he said.

Q. You can't be sure about that? A. Well, I will back go back to my notes and find out whether he said the exact words, campaign manager, but the import was exactly the same, that he had put him over.

Q. This is your conclusion, because you are not certain, if I understand you correctly? A. Well, no. I did write the memorandum, and tonight I will refresh my memory on that memorandum as to the exact words that I dictated, attempting to follow as faithfully as I could what the Secretary said.

Q. Now, on the next to the last paragraph on page 2, you refer to an illuminating footnote, which is then
707 quoted in this statement, and that is followed by the statement: Judge Sirica in the District Court had already referred to those trying to climb abroad this "gravy train" with the help of the Secretary.

Now, you, of course, are familiar, as we are, with Judge Sirica's opinion in the previous proceeding, and I ask you is that a fair statement of what Judge Sirica said about a gravy train? A. There should have been a comma after gravy train. Maybe there was, too. This seems to be a rather rough copy.

Mr. Pittle: Well, I will withdraw the question. I have nothing further.

First, I would like to offer in evidence Defendant's Exhibit No. 20 for identification.

Mr. Wiener: No objection.

The Court: It is received.

(The document previously marked Defendant's Exhibit No. 20 for identification was received in evidence.)

Cross Examination

By Mr. Wiener:

Q. Mr. Littell, in the 17½ years that have elapsed since you first became General Counsel and Claims Attorney for the Navajo Tribe of Indians, how much have you received as compensation, distinguishing the word
70S compensation for reimbursement for necessary out-of-pocket expenses? How much have you received as compensation in respect to claims cases that you carried on on behalf of the Navajo Tribe during that period? A. Not one cent.

Q. In connection with the case Healing against Jones, have you discussed with the governing body of your client the question of a reasonable or proper or contractual amount of compensation for your services in bringing that case to at least a partially successful conclusion? A. I have not.

Mr. McKevitt: I object to the question. The governing body is the client.

The Court: You mean the Council?

Mr. Wiener: Certainly, that is the only governing body that there is. It is right in the Code. It is in the opinion of the Court of Appeals.

The Court: Very well.

By Mr. Wiener:

Q. In connection with your work in bringing to at least a partially successful conclusion the case of Healing against Jones, have you submitted any voucher for compensation to the Secretary of the Interior or the Commissioner of Indian Affairs pursuant to the provisions of RS 2104, 25 U.S. Code 82? A. No.

709 Q. Mr. Pittle developed that you simultaneously represented at one time not only the Navajo Tribe of Indians but also the Avalcalente Band of Indians in California? A. There were several bands, yes.

Q. Several bands? A. Yes.

Q. Did these two Indian groups, the Band of California Indians and the Navajo Tribe have any conflicting interests? A. No relation whatsoever.

Q. And no adverse claims, one against the other? A. No, none whatever. They were on a common legal plateau under the Treaty of Guadalupe, but they had no relation or conflict with each other whatsoever.

Q. Under examination by Mr. Pittle in connection with the compensation clause of your present contract, appearing on page 40, which provided, without going into the precise language, that the compensation of associate attorneys could be increased from time to time by amendments in the Tribal budget, and you testified, I believe, that this was found inconvenient and was stricken by amendment? A. That is right.

Q. And I will ask you to look at paragraph 5 on pages 52 and 53 of the Plaintiff's Exhibit A, and tell His Honor whether that was the amendment that effected the change about which you testified?

710 I believe it was, counsel.

Q. Now, as of 1 November, 1963, Mr. Littell, what was the approximate annual income of the Navajo Tribe of Indians? A. Approximately \$12,000,000 plus per year.

Q. And as of 1 November, 1963, what was the approximate annual budget of the Navajo Tribe of Indians? A. I believe it was a \$20,000,000 budget, that year.

Q. And where did the balance between income and outgo come from? A. It was expenditure of capital. There were some \$80,000,000 in the treasury, and I am speaking now in round terms, as I was not prepared for these questions.

Q. And can you give an approximation of the value of the known value of the resources, tangible capital resources, of land and money and anything else, of the Navajo Tribe of Indians as of 1 November, 1963?

A. Well, no one can be precise about that, but between some 10,000,000 millions tons of coal, and unexhausted and unexplored oil resources, not to mention one of the finest timber stands in the West, it could conservatively be said, and I think could not be denied by any knowledgeable person, that we are talking about several hundred million dollars.

Q. Now, at that same date, 1 November, 1963, how many members were included in the Legal Department of 711 the Navajo Tribe of Indians, yourself included.

A. Seven.

Q. And as of today, Mr. Littell, how many members are there of the Legal Department of the Navajo Tribe of Indians? A. I am afraid I am the last of the Mohicans, except that Spencer Johnson, who was the last surviving member of the Legal Department at Window Rock, is still there by my urging, imploring and requesting him until February 28th; and Leland Graham, who is the other representative of the Tribe here in Washington is still with me on the same grounds, although some time ago he tendered his resignation tentatively to me, and I urged him to disregard it, and I have disregarded it because of the desperate plight of the Navajo Tribe, and the frightful damage to its legal work.

Mr. McKevitt: Your Honor, I object to the characterization.

Mr. Wiener: Well, Mrs. Denetsone talked about and used the word desperately.

The Court: Well, the only thing is, there was in effect cross examination, because Mr. Pittle called the plaintiff as an adverse witness, and thereby being permitted to cross examine him, and he asked him a lot of questions about his opinion, and why did you do that, or how did

you know, and things like that, and I will have to evaluate the testimony the same as I did on the direct examination. All right, let us proceed.

By Mr. Wiener:

Q. What happened to the other four, Mr. Littell? Between 1 November, 1963, and today? A. Well, they all resigned. These were the men who were mentioned in Amendment 13.

Q. Now, before you get to Amendment No. 13, did they indicate to you their reasons for their resignations? A. Well, yes, a basic, the basic reason, aside from the terrible atmosphere in which this struggle with the Secretary of the Interior and Mr. Nakai went along, was the fact that they could not live on those salaries.

Their salary raises were authorized by unanimous approval of the Council, and even Mr. Nakai had sent through a memorandum of June 27th recommending their approval, and I don't know what happened to it, but it ended up with no approval.

Q. Now, turn to page 14 of Plaintiff's Exhibit A, at the bottom of the page, and there is a reference there to Amendment No. 13 raising the attorneys salaries.

Do you see that? A. Yes.

Q. Do you have a copy of that Amendment 13? A. Yes.

Q. May I have it, please?

713 Will you mark this, please, for identification as Plaintiff's Exhibit Y?

(The document was marked Plaintiff's Exhibit Y for identification.)

By Mr. Weiner:

Q. Now, was this Amendment 13, Plaintiff's Exhibit Y, approved by the Council? A. Yes, sir, on May 10th, 1963.

Q. And I see it purports to be signed by Mr. Nakai as Chairman under date of July 18, 1963. A. I want to correct my testimony. The appropriation therefor was

approved on May 10th. The resolution approving the amendment was approved on May 13th, after I had left Window Rock, the following Monday.

Q. Now, was this Amendment No. 13 after its signature by the parties thereto submitted through the channels of the Department of the Interior for approval pursuant to the provisions of RS 2103? A. Yes, sir.

Mr. McKevitt: I object to the form of the question, unless he knows.

The Court: Well, I assume these questions are, that he knows.

Mr. Wiener: Certainly, I am asking the questions of his personal knowledge.

714 The Court: He should not be guessing.

The Witness: I do know.

Mr. McKevitt: Your Honor, I don't believe this witness is authorized to answer questions by hearsay as he did earlier in the proceedings, and I want to see if he knows.

The Court: Well, if he says he does.

Do you know?

The Witness: Indeed I do know.

I confirmed it with the Department of Interior, Bureau of Indian Affairs.

By Mr. Wiener:

Q. Has this Amendment No. 13, Plaintiff's Y for identification, been approved by the Secretary of the Interior?

A. No, it has not.

Q. Has it been disapproved by the Secretary of the Interior? A. It has not.

Mr. Wiener: If Your Honor please, may we approach the bench?

(Thereupon, counsel approached the bench and the following occurred:)

Mr. Wiener: All I have in mind is this: Strictly speaking, the plaintiff is now on the stand as part of the defend-

ant's case in chief, and strictly speaking, therefore, since
this is the defendant's case, I didn't make my proof
715 through him.

However, I believe it is in Your Honor's discretion to admit this into evidence at this time.

What I would like to do is that as Mr. Littell identifies a particular exhibit to offer that in evidence.

The Court: Any objection?

Mr. Pittle: No, as long as it is pertinent and relevant.

Mr. Wiener: Of course.

The Court: You are putting it in as part of your evidence?

Mr. Wiener: Well, this is part of the cross examination.

Mr. Pittle: Was Your Honor's ruling on Mr. McKevitt's objection on the ground of hearsay?

The Court: He said, if he knows.

He said he'd check with the Bureau, apparently.

Mr. Wiener: All the hearsay Mr. Littell testified to was in response to questions elicited by them.

The Court: Well, there has been a lot of hearsay on both sides.

Mr. Wiener: And I will put these exhibits in.

The Court: I think we had better recess until tomorrow morning.

Mr. Wiener: We only sit a half today tomorrow,
716-780 Your Honor.

The Court: That is right.

(Thereupon, at 4:00 o'clock p.m., an adjournment was taken until 10:00 o'clock a.m., Friday, February 5, 1965.)

* * * * *

781

Washington, D. C.,

Friday, February 5, 1965.

* * * * *

782

PROCEEDINGS

Mr. Wiener: Will you resume the stand, please, Mr. Littell?

Thereupon

Norman M. Littell

resumed the witness stand pursuant to the adjournment and testified further as follows:

Cross Examination (resumed)

By Mr. Wiener:

Q. Mr. Littell, when the Court recessed yesterday, I believe you had identified Plaintiff's Exhibit Y, which was Amendment 13 to your attorney contract with the Navajo Tribe? A. Yes, sir.

Q. And you had said that although this contract was executed by Chairman Nakai on 18 July, 1963, there had been no action on this contract by the Department of Interior from that time down to the present day? A. Yes, sir.

The Court: What was the date of it?

Mr. Wiener: July 18, 1963, Your Honor.

I offer this in evidence.

The Court: Any objection?

Mr. McKevitt: Your Honor, I object on the ground that it is immaterial and incompetent, and I don't know what issue in the case it refers to.

The Court: What is the purpose?

783 Mr. Wiener: The purpose is to show, to document what Mr. Littell has said, that it was the purpose of the Secretary to destroy his legal department, and that here is a contract not acted on for a year and eight months, neither proved nor disapproved, just sat there, and I think that is relevant.

The Court: Does this ordinarily go to the Department of the Interior for approval?

Mr. Wiener: It has to under the statute.

The Court: Well, I will admit it.

(The document previously marked for identification as Plaintiff's Exhibit Y was received in evidence.)

By Mr. Wiener:

Q. Showing you Plaintiff's Exhibit Y, Mr. Littell, I note here in paragraph 3 of page 2, paragraph 3 (a), that Mr. Walter Wolf's salary is to be raised to \$15,000 from and after July 1, 1963.

Do you see that. A. Yes.

Q. Is Mr. Walter Wolf one of the attorneys who has resigned during the period between the signature by the parties to this amendment and the present time? A. Yes.

Q. Then in paragraph 3 (b) there is a provision for the raise of compensation of Mr. Spencer K. Johnston 784 to \$11,500.

Is he another one that has resigned? A. Yes, he's the last one to leave, the end of this month.

Q. Then in 3 (c) the compensation of Theodore E. Carver raised to \$8,500.

Is he another one that has resigned? A. Yes, he was the first to leave.

Q. Then paragraph 3 (d), James E. Thompson to be raised to \$9,000.

Is he another resignee? A. Yes.

Q. Paragraph 3 (e), compensation of Henry J. Barnes to be raised to \$8,500.

Is he another resignee? A. Yes.

Q. Since November 1st, 1963, have there been non-routine legal problems of substantial magnitude affecting the Navajo Tribe?

First, let me see if you can answer that yes or no. A. Yes.

Q. Will you name some of those problems of magnitude, giving simply their thumbnail designations?

Mr. McKevitt: I object to the form of the question. Counsel is characterizing the type of problems.

The Court: He can tell us the nature of the problems.

785 Mr. Weiner: After all, I don't want to ask him about every routine contract, lease, and so forth.

I am asking him about the non-routine matters.

The Court: Well, all right. He probably understands.

Mr. Wiener: Yes, sir.

The Witness: Well, right now, I am picking from the mass of unfinished business, one major problem, that is all I can do, and that is the completing, endeavoring to complete the form of the contract for lease to the Utah Construction Company, or an amendment to their lease.

The Utah Construction Company is one of the big coal operators who support the Arizona Public Service Power Plant at Four Corners. I think that is enough.

By Mr. Wiener:

Q. Would that be a contract that requires Secretarial approval? A. Ultimately, most certainly.

Q. Very well, what is the next problem of magnitude? A. Well, undoubtedly, the greatest and most harassingly complex legal problem is the question of the status of the controverted area discussed yesterday, the 1,800,000 acres of the two and a half million acres in the so-called Hopi Executive Order of December the 16th, 1882.

There is a map there, counsel, if you wish to illustrate it.

786 Q. Yes, sir, and that is the area, and within the realm of judicial notice, that is the area that the Navajos and the Hopis now hold in common? A. Well, the judgment so said, and there is this conflict I described yesterday, which I dare say I need not repeat.

Mr. McKevitt: The judgment in which case?

Mr. Wiener: In Healing against Jones.

The judgment in the case in Healing against Jones, 210 Federal Supplement 125, affirmed 373 U. S. 758.

The Court: There was another one at 174, wasn't there?

Mr. Wiener: Yes, that was at 174 Federal Supplement 110, Your Honor, and the three-judge court overruled the motion of the United States to dismiss for want of jurisdiction.

The judgment on the merits, going into the controversy in a very lengthy opinion, is in 210 Federal Supplement, and that was affirmed on the appeal of both the Navajos and the Hopis at 373 U. S. 758.

The Court: So what is the status now between those two tribes? What do they own or control?

Mr. Wiener: I am going to ask Mr. Littell to answer Your Honor's question.

The Witness: Would you mind putting the map up, counsel? It would be very helpful to me and the
787 Judge, I believe.

The Court: Do you need some help there?

The Witness: There is some Scotch tape in my bag. May I get it?

The Court: Put it on the board over here.

(The document was marked Plaintiff's Exhibit Z for identification.)

The Witness: Would it be permissible for me to step over there?

Mr. Wiener: I am going to ask the witness to step to the map. Is there a pointer?

I am going to ask you to speak up, Mr. Littell, because there is no loud speaker?

The Court: What is the exhibit number?

Mr. Wiener: It is Z for identification, Your Honor.

The Witness: If Your Honor please, without giving legal descriptions, which would greatly extend this whole matter, the purpose of this map is to show ultimately in my discussion the distinction between the conflicting claim of the Hopis and the Navajo Tribe in the Indian Claims Commission, and the three-judge court decision of which you just had the citation.

This distinction runs all the way through the records because they had to distinguish between these two cases.

788

By Mr. Wiener:

Q. Now, will you restrict yourself first to the lands in controversy in the litigated three-judge court case of *Healing vs. Jones*. A. Yes.

I have to describe this cross-hatched area as what was claimed by the Hopis, but within that, in this square or parallelogram the area of Executive Order of December 16th, 1882, for the Moquis, which is another name for the Hopis, and such other Indians as the Secretary would see fit to settle there.

The Navajos occupied all the gray area, except this white, all the gray area in that parallelogram.

The Hopi Reservation is now settled by the decision, to which counsel has just referred, the three-judge court decision, in this area, which for convenience let us describe as approximately 600,000 acres, the white spot in the middle of the reservation.

Q. May I interject there?

Is the area that is jointly held under the decision of the three-judge court, as affirmed by the Supreme Court, the shaded area within the parallelogram, to which you have referred, which is the Executive Order reservation? A. That is correct.

By the Court:

789

Now, let me ask you: Which Tribe occupies the shaded part in the light part there? A. The Navajos, in toto.

Q. And the other part, which Tribe? A. The Hopis. There aren't, as I recall it, six Hopis in the shaded area, and I believe those are only grazing permits that extend over the boundary line.

Mr. McKevitt: Which shaded area do you mean?

The Witness: I am talking about the shaded area in the parallelogram.

The Court: I was trying to get a picture in my own mind of which Tribes occupy certain parts of that.

The Witness: Certainly, Your Honor, and that is why I thought this map was necessary.

The total occupation, recalling my testimony yesterday, if I may speak of that, the reason that this terrible conflict exists is that the findings of fact and conclusions of law conclusively sustain that the Navajos were settled in all of this area, outside of the Hopi area, as a matter of fact, a little inside it, too, but we have omitted that, that is about 200,000 acres, but for simplicity's sake, the Hopis were settled there by approval of the Secretary, by the Order of February the 7th, 1931, which recognized the Navajos as those other Indians settled there, other than by the Secretary.

Mr. McKevitt: I object, Your Honor. He wants to
790 argue the case rather than tell the facts.

The Court: If I find time, I am going to try to read these two opinions thoroughly, from beginning to end, so I can get the picture.

Mr. Wiener: May I ask a few questions more?

By Mr. Wiener:

Q. Mr. Littell, what is the shaded area beyond the Executive Order around this inner circle, going down the Arizona-New Mexico line, shaped like a flattened egg?

A. That is the land which the Hopis' attorney claimed before the Indian Claims Commission in the consolidated land case, 229 and 96, as far as that case is concerned, and the other tribal conflicts.

Q. Now, the only area—A. I say claimed land. I don't mean that, compensation for land wrongfully taken.

You don't recover land in the Indian Claims Commission.

Q. The rectangle at the left of the map, which is marked Executive Order Reservation, the disposition of that land

was in issue in *Healing vs. Jones*, am I correct? A. That is correct, and accepted from the Indian Claims Commission.

Q. Now, the other rectangle farther to the right of the map, which crosses the New Mexico-Arizona line,
791 which is labeled 1868 Navajo Treaty Reservation, I take it that is the land set aside for the Navajo Tribe by the Treaty of 1868? A. That is right, the original reservation.

Q. Now the next question, and then you can resume the stand.

Am I correct in believing that the pending legal problem as between the Navajos and Hopis deals with the disposition of land within the 1882 Executive Order Reservation?

Mr. McKevitt: I object, Your Honor, to pending. The case is finished and decided by the Supreme Court.

The Court: Is there a pending matter?

Mr. Wiener: There is a pending question that I haven't had time to develop.

The Court: All right, ask him the question. Let us proceed.

By Mr. Wiener:

Q. Is there now a problem of controversy, not in litigation, concerning the disposition of the shaded area within the 1882 Executive Order Reservation, which under the judgment of the three-judge court in *Healing vs. Jones*, affirmed by the Supreme Court, was declared to be held in common by the Navajos and Hopis? A. Yes.

Mr. McKevitt: I object to that. It calls for a conclusion of the witness.

792 The Court: Well, it is his interpretation, I suppose, of what the opinion means.

Mr. Wiener: I am trying to pinpoint the controversy, Your Honor.

The Court: Well, I am going to give you a chance to brief this question.

Mr. McKevitt: It is just his opinion.

Mr. Wiener: All right, will you resume the stand?

The Court: I will let you examine further on that.

Now, let me see if I understand you gentlemen. These exhibits that were brought in here, which, of course, I haven't had an opportunity to read, which are over here in the files, have to do, I suppose, from what I have heard, whether or not Mr. Littell wrongly or rightly charged the Navajo Tribe—well, put it this way, whether or not, first of all, he did certain things under his general contract for being General Counsel, and whether or not he in effect said, Well, this part of what I did or this work I did, had to do with claims, or vice versa.

This is what the Tribe complained of, or Nakai, the Chairman, claiming that under the contract for general services, he was going beyond that, and he was claiming that certain work had been done in connection with claim matters; that is correct, isn't it?

Mr. Wiener: Yes. One question was: Was it a claims case for which he was entitled to compensation by a
793 percentage of the recovery, or whether General Counsel, which was subject to recovery.

Then there is a further controversey, and I am not going to argue whether it was consistent with the other contention, but there is a further contention, that assuming Healing vs. Jones to have been a claims case, the contention is that Mr. Littell improperly used General Counsel attorneys paid by the Tribe for work on that claims case.

The Court: Let's see if you can agree with that statement or not.

Mr. McKevitt: In the first place, I would say one of the claims is failure to disclose to the Tribal Council the situation in Healing vs. Jones.

Secondly, as a matter of working on the contract, the attorneys working on the claims case were not confined to Healing vs. Jones, but to to all the other claims work in the office, too.

The Court: Well, I assume both sides will go into that in some detail.

Mr. Wiener: Yes, but at the present time I am developing the testimony on another point.

By Mr. Wiener:

Q. I think my last question, Mr. Littell was: Is there currently a problem or a controversy concerning the ultimate disposition of the land, which under the judgment in Healing vs. Jones, is held either jointly or in common by the two Tribes? A. A major problem.

Mr. McKevitt: I hate to be insistent, but I think he should say, in his opinion.

The Court: He is stating his opinion, isn't he? This is his opinion?

Mr. Wiener: Yes.

Mr. McKevitt: Well, he can phrase the question that way.

By Mr. Wiener:

Q. In your opinion, Mr. Littell, is there now a problem or a controversy? A. Most decidedly.

Q. Has legislation been introduced in respect of attempting to settle that controversy? A. In the last Congress, but not yet in this one. It is anticipated.

Q. Now, were there, going back to my basic question, are there now and have there been since 1 November, 1963, other major non-routine problems involving the Navajo Tribe of Indians other than the Utah Construction Company lease, and the question of the ultimate disposition of the recovery in Healing vs. Jones. A. yes, sir.

795 Q. Will you name the next one? A. The first major problem that I would name relates to what we just talking about, and that is why I wanted the map.

The Century Royalty exploration permit with right to lease is the application of another company for coal op-

erations, subsidiary to Peabody Coal Company, which originally—

Q. Well, before you go into that, is that the Century matter that Mr. Nakai mentioned on the stand yesterday?

A. Precisely.

Q. Now, in capsulated form, what is the problem arising out of the Century Royalty exploration permit?

A. The company is already in operation, north of the north boundary of that parallelogram, representing the Executive Order, but the coal seams ran south into the controverted area.

They applied for an exploration permit—

Q. To whom. A. To the Tribe, which goes before the Advisory Committee, what we call the old Advisory Committee, that is, and the first Advisory Committee in the Nakai administration in May approved such a permit on the basis of joint use with the Hopis.

Now, let me make clear, there is no quarrel with issuing the permit, Century should have this permit, but
796 this permit was never submitted to the Legal Department.

It went through the Bureau of Indian Affairs where I am told it was—

Q. Not what you were told. A. Sir?

Q. Not what you were told. A. I beg your pardon.

In any event, the resolution of May, 1963, was approved recognizing the joint use of this area, to be approved by the Hopi Council and the Navajo Council.

When it finally reached my attention, I called attention to two things that were illegal or wrong about that resolution.

One, it was in conflict with the Council resolution of August 29, 1963, in which the Council specifically said, and unequivocally said that no person and no committee and nobody should make any deal with respect to the controverted area in negotiation with the Hopis without reference back to the Council.

The Advisory Committee had inadvertently, let us say, done this.

Secondly, it committed the Tribe to the joint—

Mr. McKevitt: I object. If Mr. Littell is going to say these things are so, I wish he would say that in his opinion they are.

797 The Court: Well, I will have to consider his testimony in connection with whether or not is his opinion or not. I assume this is his opinion.

Mr. Wiener: Of course it is his opinion. It is offered as opinion evidence, and it is a predicate to a fact I plan to develop later.

This is not an argument on the law on the merits. This is adduced as an enumeration of a current legal problem.

The Court: I understand.

Mr. McKevitt: Well, I simply want to the record to say that.

The Court: Well, if you have to examine him further, I will permit you to do that.

By Mr. Weiner:

Q. All right, go ahead. A. Secondly, as I started to say, it recognized the joint-use area, which was in conflict with my advice to the Tribe, that their legal position in possession had been established by the court and was admitted by the attorneys of the Commission.

They said there was no legal authority to remove one single Navajo.

Q. That at any rate is the problem? A. That is the problem, and it ends in a slight conflict with the Chairman, who accepted the Bureau view, and when the
798 present Advisory Committee passed a resolution to revoke the prior resolution and straighten the matter out to avoid that damaging language, which the Bureau of Indian Affairs could have used before Congress to state—

Mr. McKevitt: Your Honor, when he said to straighten the matter out, these are all his opinions.

The Court: Will you agree that is his opinion?

Mr. Wiener: Certainly.

Mr. McKevitt: He is a lawyer and he should know we are dealing with the factual situation.

Mr. Weiner: I am trying to develop as succinctly as possible and in as broad an outline as possible, Your Honor, the nature of the controversy as viewed by the Tribe's General Counsel.

By Mr. Weiner:

Q. Now, without going into detail, Mr. Littell, what is the present status of the controversy over Century, about which Mr. Nakai testified the other day, as one of the issues between him and you? A. I drafted the resolution for the new Advisory Committee, which was adopted, revoking the other one, and referring the matter to the Council for passage.

Q. And it has gone to the Council? A. It went to the Council but it has not as yet been acted upon.

799 Q. Very well, that is fine.

Now, were there any others, continuing our enumeration of the major legal problems affecting the Navajo Tribe of Indians, since the first of November, 1963, were there in addition to the Utah Construction Company lease, the disposition of the Healing vs. Jones recovery, and the Century Royalty exploration permit? A. Well, we have continuously the lurking and haunting problem of the school land sections on which all work has been suspended during this crucial period.

Q. And is that the Utah school land sections to which reference has been made in Court? A. Yes; it is a broader question.

Q. Yes, I understand, and I will develop it later.

Now, my question is: Since November 1st, 1963, have you in your capacity as General Counsel of the Navajo Tribe of Indians, had any communication from anyone in the Interior Department regarding the Utah Construction Company lease? A. No.

Q. Since November 1st, 1963, have you in your capacity as General Counsel for the Navajo Tribe of Indians, had any communication from anyone in the Department of Interior regarding the ultimate disposition of the lands now jointly held by the Hopis and the Navajos under the judgment in *Healing vs. Jones*?

800 Mr. McKevitt: Your Honor, I would object to this line of testimony, after November 1st, 1963, which is simply 15 days before this suit was filed.

The Court: Well, I don't know counsel's purpose.

Mr. Wiener: I will be happy to state it.

The Court: Enlighten me a little bit on it.

Mr. Wiener: I will be happy to state it.

I am endeavoring to show, and I think I can prove, that ever since November 1st, 1963, the Department of Interior in its handling of and dealing with Navajo problems has deliberately short circuited the lawfully appointed and acting General Counsel of the Tribe.

In other words, they are dealing with the client behind its lawyer's back. That is the purpose.

The Court: Is this about the date that the Secretary of the Interior wrote the letter?

Mr. Wiener: November 1st, November 1st, 1963, is the suspension date, and that brings it down to the payment time.

The Court: Well, now, you have an issue in this case, I think, Mr. McKevitt, as to whether or not the plaintiff exhausted his administrative remedies in this case. That is one of the things you contend.

Now, would this or would it not go to the question of whether or not because of what transpired or occurred, it was useless to go before the Interior Department
801 to exhaust any administrative remedies that the plaintiff may have had?

I am just thinking out loud, I don't know, but that is something I want to hear you gentlemen on, as to whether or not under all the circumstances, everything that has

transpired and occurred, whether the plaintiff, which is one of the points I think you have to develop or might develop, whether or not after he was suspended on November the 1st, 1963, whether or not the plaintiff should have under the law, if the law states that, to continue to try to get relief before the Department, or the Interior Department, or whether he should have done what he did, that is, sought an injunction in this Court.

This is when he started the injunction proceedings. This is one of the questions I think that might arise.

Now, this may be material on that issue, I don't know.

All right, I will hear you.

Mr. McKevitt: I just wanted to say, Your Honor, that his failure to exhaust his administrative remedies ends at about November 1st, because since the Secretary requested Mr. Littell to show cause, and he didn't answer any questions, and he did nothing, but started this law suit.

So I think the issue as to whether or not he exhausted his administrative remedies, it is that he didn't
802 do anything, and what happened after that is irrelevant.

The Court: Well, I will keep an open mind on that point.

Mr. Wiener: If Your Honor will admit it, I am not going to argue it further.

The Court: Well, I will let him testify.

Mr. Wiener: Will you read the last question?

(The last question was read by the reporter.)

The Witness: Nothing unless you count an indirect communication to the Chairman, undoubtedly intended for my consumption—

By Mr. Wiener:

Q. No, the question is: Did you as General Counsel receive a communication? A. No, I did not.

Q. You mentioned a bill introduced in the last Congress providing for the disposition of jointly-held lands.

Was that bill submitted to you as General Counsel by the Department of the Interior for your comments? A. Oh, no.

Q. In connection with the Century Royalty exploration permit, what did the Department of the Interior or any of its subordinate officers or agencies ever submit to you in your capacity as General Counsel for the Navajo Tribe of Indians, anything pertaining to that matter?

803 Mr. McKevitt: I object to that question. There is nothing to show that is a function of the Department of the Interior. It is a very general type question.

The Court: Well, he asked whether or not there was. I don't know.

He may answer.

The Witness: No, sir; unless with the single exception I mentioned, it has not.

By Mr. Wiener:

Q. Was there anything addressed to you? A. No, sir.

Q. Now, prior to November 1st, 1963, Mr. Littell, what was the practice of the Department of the Interior respecting bills affecting Navajo interests with respect to submission to the General Counsel? A. Oh, we had years of collaboration on that.

Mr. McKevitt: The witness has not been qualified to answer that, as to the practice of the Department of the Interior.

The Court: Just with respect to what?

Mr. Wiener: To the General Counsel of the Navajo Tribe. Well, I will reframe the question.

The Court: All right.

By Mr. Wiener:

804 Q. Between August, 1947, and November 1st, 1963, were you familiar with the practice of the Department of the Interior with respect to submission or non-submission to you as General Counsel of the Navajo

Tribe of bills introduced in Congress affecting or likely to affect the interests of your clients? A. Yes, sir.

Q. What was that practice? A. The practice was one of collaboration and sending me a copy of the bill, even if they sent a copy to Window Rock first, a copy would come to me because they knew it would come right back to my desk anyway.

Q. Now, between August, 1947, and November 1st, 1963, what was the practice of the Department of the Interior and its subordinate agencies in respect to submitting to you as General Counsel of the Navajo Tribe leases and permits similar to those involved in the Utah Construction Company and the Century Royalty Exploration Company matters? A. Well, counsel, the practice was that the leases and permits originated the other way. Perhaps I misunderstood you.

You see, they were negotiated out in the field, with the aid of the field staff of the Bureau, and there they collaborated with the Legal Department, and when the policy question hit the Washington front, if I was not already tied into the picture on the legal side, I then collaborated most effectively and constructively with the staff.

805 Mr. McKevitt: Your Honor, I object to the answer, to the characterization in the answer.

Mr. Wiener: Oh, if Your Honor please.

Mr. McKevitt: That is not any part of the testimony, Your Honor.

Mr. Wiener: Well, I know but—

The Court: Just a minute. One at a time, gentlemen.

I will ask counsel to make his statement, and then the other counsel.

Mr. McKevitt: I would ask Your Honor to ask the witness to confine it to facts, and not to characterizing his own work.

The Court: Well, that is what you call a conclusion. Whether it was effective or not is a question I might have to decide.

It is difficult in a non-jury case like this not to really relax the rules of evidence, so to speak.

I have given you considerable latitude and I have given the other side considerable latitude.

In the final analysis, I am going to have to sift and evaluate all this evidence when I get out an opinion in this case, and I think the more information I get, the better position I will be in to do that.

Mr. McKevitt: You should have all the information, Your Honor, but not the witness' own characterization.

806 The Court: Well, let us seek information instead of conclusions.

Mr. Wiener: Yes, sir.

By Mr. Wiener:

Q. Now, since November 1st, 1963, to what extent has the Department of the Interior, including their subordinate agencies, communicated with you in your capacity as General Counsel of the Navajo Tribe on matters affecting the interests of the Navajo Tribe? A. None whatever, except in the last month, I have been out there since November 23d, and the Superintendent has discussed with me a couple of problems and I with him, and I helped him, for example, shape up the resolution on the possible lease to the B.V.D. Corporation, which was one of Mr. Nakai's main projects.

Q. Now, let us go back to March, 1963, and earlier, to the election campaign, which counsel for the defendant had brought into the case.

One of the witnesses, and I don't remember, Your Honor, whether it was Mrs. Denetsone or Mr. Todacheene, talked about the livestock program and criticized your connection with it.

My question is, Mr. Littell, What connection did you have with the Navajo Tribe's livestock program? A. None whatever, with this qualification.

807 Q. Well, let me put it this way: As General Counsel of the Navajo Tribe, did you have any connection with the program? A. I did, indeed. After 1947, I got Secretary Krug to suspend the whole stock reduction grazing regulations, except for dipping and branding in the health of the reservation.

Mr. McKevitt: I object to that as calling for a conclusion and ask the answer be stricken. The witness said, I got Secretary Krug to do this.

The Court: All right, strike the answer.

Do you know what the Secretary did?

By Mr. Wiener:

Q. Do you know what the Secretary did? A. I do, indeed.

Q. What did he do? A. He suspended the grazing regulation.

Q. And what was— A. Except for dipping and branding, which is necessary for the health of the reservation.

Q. And what was the effect of suspending the grazing regulations on the amount of livestock owned by members of the Navajo Tribe? A. Sir, it was too late to be effective on that front.

The livestock on the reservation had been cut in the preceding stock reduction period before I became General Counsel, from '38 to '42 or along in there, from
808 approximately 1,200,000 heads to 600,000 head, practically at one fell swoop.

Q. At whose request did Secretary Krug suspend the grazing regulations? A. Mine.

Mr. McKevitt: I object to the question.

Mr. Wiener: If you know.

The Court: At whose request did the Secretary suspend the regulation?

Mr. Wiener: Yes, Your Honor. If you know.

The Witness: I do, indeed.

The Court: Just a minute. If he has any correspondence or anything related to any request, he may refer to that.

By Mr. Wiener:

Q. Did you make a request of the Secretary that he suspend the regulations? A. I did, an oral discussion of the subject in his office, and I believe that there is correspondence, but I can't remember.

The Court: You are speaking about the present Secretary?

Mr. Wiener: No; Secretary Krug.

The Witness: Krug.

The Court: That was how long ago?

The Witness: 1948 or '49; '48, I believe—'47 or '48.

809 The Court: Very well.

By Mr. Wiener:

Q. Did you in another capacity have anything to do with the livestock program on the Navajo Reservation? A. The answer is, No, except for this qualification. As Assistant Attorney General of the United States in charge of the Lands Division, my staff had to bring ejectment proceedings for any department that had trespassers, or any other wrongful action on Government land.

In the campaign, Mr. Nakai's campaign, there was widely used a letter, purporting to be a copy of a letter signed by Assistant Attorney General Norman Littell, directing the United States Attorney—

Mr. McKevitt: I object to this testimony.

Mr. Wiener: May we approach the bench, Your Honor?

(Thereupon, counsel approached the bench and the following occurred:)

The Court: What do you propose to show? What is your offer of proof?

Mr. Wiener: My offer of proof is, that there has been injected into the case, over plaintiff's strenuous objection, the issues in the election campaign that resulted in Mr. Nakai's election.

The Court: The defendant introduced the evidence.

Mr. Wiener: Yes, the defendant introduced that
S10 evidence, and the defendant's witnesses were examined at great length about all of Mr. Littell's alleged shortcomings, how he was fighting the Tribe, and unfriendly with the Tribe, and the handling of the livestock program.

Now, I want to show that these charges, which the defendant has injected into the case, although I will cheerfully agree that they are irrelevant and not in issue, but they were introduced by the defendant, but I am in a position now of having to prove a negative, and that takes a lot of time.

Mr. McKevitt: My basic objection was that the witness' answer was not responsive to the question. They simply asked him what he had done, and in answer to that he goes around and tells what Nakai did in the campaign, and I am objecting that the witness didn't answer the question, which was if he had anything to do with the livestock program.

I would like to have him answer that.

The Court: Well, he is talking about his experience as an Assistant Attorney General.

Mr. Wiener: But he wanted to tell about the letter that Nakai used.

If you say this is a bunch of nonsense, I would agree, but since it is in the record, I have to rebut it.

Mr. McKevitt: I object to this.

Mr. Wiener: But you brought it in.

S11 Mr. McKevitt: He doesn't answer the questions.

I am happy to have him answer the questions, but he volunteers. He wasn't responsive.

The Court: Well, for instance, I remember Mr. Pittle yesterday, on more than one occasion, you would ask them, even though you were examining them as hostile witnesses, Why did you do this, why he did that, and the next thing is, why, how do you know?

Mr. Pittle: But I tried to stop him.

The Court: But when you do that, you open the door. You don't know what is coming.

Mr. Pittle: I didn't try to open the door, but I was overruled.

The Court: This question of the issues in the campaign has been injected into the trial or the hearing by the defendant, and apparently, I suppose, for the purpose of showing what Mr. Nakai had against Mr. Littell, or for various reasons.

Mr. Pittle: This is not essentially a personal vendetta, as charged by the plaintiff, but it is a political scuffle between two factions.

These are not minor dissident groups, but these are major differences.

The Court: If he can testify as to some of the things that were referred to by Mr. Nakai, giving the other
S12 side of the picture, I do not see why he should not be permitted to do so.

Mr. McKevitt: If he answers the question, I don't know that I would have to object.

But I have to protect the record.

The Court: Well, all right. Try to get him to answer the questions.

All right, let us proceed.

(Thereupon, counsel resumed their places in the courtroom and the following occurred:)

By Mr. Wiener:

Q. The question was, Mr. Littell: You had said when the objection was made, that Mr. Nakai during the campaign waved before the qualified voters of the Navajo Tribe of Indians a copy of a letter purported to have been signed by you. A. Yes.

Q. And was that one of the letters that went out over your signature in connection with the activities of the Department of Justice, of which you were then a part? A. That is correct.

Q. And that was, I take it, several years before you ever had the Navajo Tribe of Indians as your client? A. That is correct.

Q. Now, I want to go through as briefly as I can a
S13 catalog of your unfriendly acts that was vouchsafed just by Mr. Barry DeRose of the Globe, Arizona Bar the other day.

Mr. McKevitt: I object to the form of the question, Your Honor.

Mr. Wiener: That is not the question, Your Honor.

Mr. McKevitt: That is argument.

The Court: He paraphrased or stated, the unfriendly acts. I don't know what you mean by that.

Mr. Wiener: Well, that is what I am going to develop. That is not a part of the question.

It was to indicate to Your Honor the changing subject, and there is no jury here.

The Court: Very well, I am not going to be influenced by counsel's statment.

By Mr. Wiener:

Q. Mr. DeRose in a catalog of your shortcomings mentioned the fact that you had made the banks unfriendly to to the Navajos?

Do you remember that testimony? A. Yes, something of that sort.

Q. Did you in your capacity as General Counsel of the Navajo Tribe of Indians represent them in a matter involving the Valley National Bank? A. Yes.

Q. Will you please explain as succinctly and briefly
S14 as possible the respective positions of the Valley National Bank and of the Navajo Tribe of Indians and what the outcome of the discussion was? A. As nearly as I can recall, this occurred in 1960. It might have been a little earlier, because it occurred after the establishment of the \$5 million scholarship fund, when the first big oil money came in, which was in '57, and therefore it might

have been an earlier date, I am not quite clear about the date.

The Valley National Bank, one of the powerful institutions of Arizona, wished to establish a branch bank.

I knew that the promotion was going on—at Window Rock, Arizona—and I know this promotion was going on but my rule was to stay out of policy questions until asked a question.

Q. Mr. Littell, just briefly, what was the issue, and please avoid characterizations.

What was the issue between the bank and the Tribe, and what was the respective positions of each, and what was the ultimate determination? A. It is very simple. Mr. Jones invited me to a meeting with them—

Q. This is Mr. Paul Jones? A. Mr. Paul Jones, the Chairman, and he finally wanted me to give my opinion on their position.

So we met, at a dinner at Gallup and finally they
815 stated their proposition, and he said we have Mr.

Littell here to give his opinion, state the proposition, and this it—

Q. What was the proposition? A. This was the proposition, out of the scholarship fund the Tribe was to deposit \$1,000,000 in the Valley National Bank without an interest charge, which would cost the Tribe \$40,000 a year, because they got 4 per cent on their money in the Treasury.

Another million at 3 per cent interest, which would cost them another \$10,000, on the same 4 per cent basis; and the balance of the \$5,000,000 scholarship fund at normal commercial rates, which vary from time to time, and I am not quite sure, but I think then it was around on the 3 per cent basis; and the Tribe would build a building for the bank and rent it to the bank at a nominal rental.

Q. What was your position as General Counsel on this proposal? A. My position given in a formal opinion, in a letter opinion to Mr. Jones, the next day or the next day, was that it should not be done for these reasons:

First, you could not use trust funds, which is what these were, for commercial purposes of the Tribe, and a conscientious trust officer should have known that;

Secondly, the State of Arizona was then endeavoring to get jurisdiction of the Tribe, and the then Attorney
S16 General Morrison had sent the tax collectors to the Tribe, attempting to tax this new oil income, and on my advice they had been turned away without information, because they lacked jurisdiction, and you may remember that Lee against Williams is on the way to the Supreme Court.

Q. Mr. Littell, we are on the Valley National Bank, if you please. A. Very well. This is the reason that it was a real legal problem, and they had not succeeded in getting jurisdiction of the Tribe, and I advised Mr. Jones that if he deposited these millions of dollars in the Valley National Bank, the Attorney General could then issue an attachment, and the Tribe would have to come into Court to defend its millions, and therefore the State would have jurisdiction, whereas as a matter of sovereign immunity, they could not get jurisdiction otherwise.

Q. What was the result of your opinion? A. The result was that the Valley Bank did not establish a branch bank at Window Rock.

Q. Now, I believe that under examination by Mr. Pittle, you told about the controversy with regard to the Arizona Public Service Company, and the question of waiving sovereign immunity there? A. I did.

Q. Now, another matter, were there rights-of-way
S17 regularly granted over the Navajo Reservation?
A. Yes.

Q. And who granted those in the first instance? A. The Advisory Committee approved them, and usually they went to the Council if they were serious matters.

Q. Did those rights-of-way require departmental approval? A. Yes, anything pertaining to the land or granting an interest in lands, goes through the Realty Section of the Bureau, and has approval back here in Washington.

Q. And was there a controversy in connection with the granting of these rights-of-way in connection with the recapture clause? A. Yes.

Q. Will you describe the controversy, stating succinctly, without characterization if possible, the respective positions of the parties, the ultimate result, and name the parties as nearly as you can remember?

First, who wanted the rights-of-way? A. New Mexico Power & Light, Utah Power & Light, Continental Divide Company, Arizona Public Service, to name a few, not to mention the Union Gas Company.

Q. Yes. A. The four principal power companies, and those I named.

Q. What was the controversy between—I take it
S18 there was a controversy between these utilities and yourself as General Counsel? A. Not really.

Q. I don't mean by controversy, fight, I mean was there a difference of legal opinion? A. Yes.

We insisted upon what we called a recapture clause, that if the Tribe gave these utilities the rights-of-way which they requested, that the Tribe should have the right to recapture them at cost minus depreciation, after enough years had rolled by. I think it was more or less ten years, was the rule of thumb, to give them a reasonable profit, and plenty of profit on their investment in the reservation.

Every one of those utilities capitulated, Utah Power & Light, New Mexico Power & Light, Continental Divide, those three at least, so that the Tribe has this latent legal right, if it ever wished to have an integrated power system with its Navajo Utility Authority, which is now operating on a tribal basis, it could have an integrated power system throughout the reservation, and it could pick these properties up at a saving of many millions of dollars.

Q. Now, in cataloging your shortcomings, Mr. DeRose also said that you were fighting the States. A. Counsel, I didn't finish the question as to Arizona Public Service.
S19 ice.

Q. Except they capitulated? A. No, they did not.

Q. I am sorry. A. No, this case rose to another very sharp controversy, because when Roger Earnton was Assistant Secretary of Interior, he suspended all school construction on the Navajo Reservation, because the Tribal Council, he said, wouldn't grant rights-of-way.

It boiled down to a complete misstatement of fact.

Mr. McKevitt: I object, Your Honor. He is going beyond the scope of the question.

Mr. Wiener: We are on the right-of-way controversy, but please omit characterizations, Mr. Littell, and give us the respective positions and the outcome.

The Witness: It was not the matter of refusing the right-of-way to the Red Lake schools from the power line of the APS on the eastern side of the reservation, it was a matter of their capitulating and agreeing to the recapture clause.

By Mr. Wiener:

Q. What was the outcome? A. They sought to suspend the school construction to force the right-of-way without the recapture clause, and we won that round, and they finally capitulated.

The Court: I think we will take our morning recess at this time.

820 (Thereupon, a short recess was had.)

Mr. Wiener: If the Court please, I now offer in evidence Plaintiff's Exhibit Z for identification.

Mr. McKevitt: No objection.

(The document previously marked for identification as Plaintiff's Exhibit Z was received in evidence.)

By Mr. Wiener:

Q. I think when we adjourned for our recess, Mr. Littell, we were going into the question of your fights with certain States of the Union.

How many States are covered by parts of the Navajo Indian Reservation? A. Three, Arizona, Utah and New Mexico.

Q. Did you have fights with all three of those States?
A. Well, differences, sharp differences of opinion on various legal issues, yes.

Q. What was the nature of your legal controversy on behalf of the Navajos with the State of New Mexico? A. One of the first programs after Mr. Nakai took office was the Navajo Reservation Development Corporation.

Q. I don't want to go into that. I have that under a separate heading.

But was there any jurisdictional controversy with the State of New Mexico during your tenure as General Counsel? A. Not one that can be described in a moment.

There is a very real conflict over the election laws. The Navajos have adopted election laws paralleling the election laws of New Mexico. But that is a long, complicated story. It is a matter of interest and of discussion.

Q. Basically, is it the question of whether the Navajo Indians resided on that portion of the reservation within the exterior boundaries of the State of New Mexico and have the right to vote in New Mexico State elections? A. That and a whole lot.

The latest one as of last month was whether two Navajos elected to the Assembly had a right to sit in that, and that is under discussion in the New Mexico Legislature now.

Q. Now, did you have legal controversies on behalf of the Navajo Tribe of Indians with the State of Utah, other than the Utah School Section case, which I will come to later on? A. Yes.

Q. Will you state the nature of the controversy, just briefly, not the details, a short description of the jurisdictional controversy? A. I was responsible with the tribal staff work of carrying into effect the exchanged lands at McCracken Mesa, and if you put the other map up you can identify it very quickly, and I think it would save time if you would be so kind as to do that.

822 Mr. Wiener: I will ask that this be marked Plaintiff's AA for identification.

(The map was marked Plaintiff's Exhibit AA for identification.)

By Mr. Wiener:

Q. Let us hold it up here. A. May I step over here, counsel?

Q. Yes. Now, Mr. Littell, very briefly tell us, not the details of the dispute, but the nature of it, the jurisdictional controversy with the State of Utah, by reference to Plaintiff's Exhibit AA for identification? A. Every one of these areas, which I assume you wish me to identify later, is in some measure subject to a dispute, but I am now talking about the area described here as S, commonly known as the McCracken Mesa Exchange Act, passed September 2d, 1958.

Q. Is there an existing controversy between the Navajo Tribe of Indians and the State of Utah in connection with that area? Yes or no? A. Yes and no, counsel.

The real controversy arose after the passage of the Act, which is now '58.

Q. Yes, very well, but there is an existing controversy? A. Yes, there is an existing controversy.

Q. Now, does this map, Plaintiff's Exhibit AA for
823 identification also illustrate the Utah school lands matter or must you refer to another map for it? A. Well, it does, indeed, to the extent of indicating the scope.

Q. Does it refer to it? A. Yes, all the shaded areas are school lands, and there are more over here.

Mr. Wiener: I don't offer it at this time, Your Honor.

Well, counsel says he has no objection, so I will offer it in evidence.

The Court: All right. It is received.

(The map previously marked for identification as Plaintiff's Exhibit AA was received in evidence.)

By Mr. Wiener:

Q. Now, Mr. Littell, did you have jurisdiction of disputes on behalf of the Navajo Tribe of Indians with the State of Arizona? A. Yes.

Q. Was that the case of Williams vs. Lee? A. It was. That was the main one.

Mr. Wiener: I am going to ask Your Honor to take judicial notice of the case of Williams against Lee in 358 United States, and I won't develop it through the witness.

The Court: Very well.

824

By Mr. Wiener:

Q. Were there other jurisdictional disputes with Arizona, other than Williams vs. Lee, and the matter of the sovereign immunity in connection with the Arizona Public Service concerning which you testified yesterday? A. Counsel, may I make a statement as to running differences with all three States, which are not serious, they are lawyer's differences, that is—

Mr. McKevitt: I object to the characterization

Mr. Wiener: I can state Williams vs. Lee. The Williams vs. Lee involved the right of Lee—

The Court: Is that L-e-e, or L-e-a?

Mr. Wiener: It is Lee, L-e-e, Your Honor. Lee was an Indian trader on the Navajo Reservation under a section, the O section—

Mr. McKevitt: I am sorry but I didn't hear.

Did you ask counsel to explain it?

The Court: Well, I would like to hear a little about it.

Mr. McKevitt: I thought he was volunteering.

Mr. Wiener: No, I am not.

The Court: Since it has been mentioned, it will probably save me reading it.

Mr. Wiener: I think I can state it in such a way that it will pass muster in Your Honor's classroom as well as your courtroom.

825 Lee was an Indian trader on the Navajo Reservation. Under the provisions of the revised statute still in force, every Indian trader must be licensed by the Secretary of the Interior. Lee was so licensed. He sold goods to Williams and Mrs. Williams, who were Navajo Indians, and they didn't pay.

Lee thereupon brought suit against the two Williamses in a State Court of Arizona.

The Navajo Tribal Council, and one of Mr. Littell's subordinates, appeared in the Arizona litigation and contended that the State Courts had no jurisdiction to entertain an action against a Navajo Indian.

This claim was rejected by the State Courts, and Mr. Littell brought the case to the Supreme Court as General Counsel, and he briefed and argued the case to the Supreme Court, and the Supreme Court in *Williams vs. Lee*, 358 U.S., although I don't remember the page at the moment, held that Indians on reservations were exempt from State jurisdiction, and that Lee's remedy was to sue the Williamses in a Navajo Tribal Court.

Now, that briefly is the case.

Mr. McKevitt: Your Honor, may I add that the United States Department of Justice also appeared in the case on the jurisdictional matter. This is not the type of controversy we were talking about.

826 The Court: All right, let us proceed.

By Mr. Wiener:

Q. One of the objects of your fights as listed by Mr. DeRose was labor.

Will you state to the Court what, if any, fights or controversies or litigation you had on behalf of the Navajo Tribe with any labor organizations? A. It is difficult to simplify this complex problem, but in essence it can be stated, I believe fairly, this way:

The Navajo Tribe after holding hearings before the Advisory Committee at which all unions were invited to ap-

By Mr. Wiener:

Q. Now, Mr. Littell, did you have jurisdiction of disputes on behalf of the Navajo Tribe of Indians with the State of Arizona? A. Yes.

Q. Was that the case of Williams vs. Lee? A. It was. That was the main one.

Mr. Wiener: I am going to ask Your Honor to take judicial notice of the case of Williams against Lee in 358 United States, and I won't develop it through the witness.

The Court: Very well.

824

By Mr. Wiener:

Q. Were there other jurisdictional disputes with Arizona, other than Williams vs. Lee, and the matter of the sovereign immunity in connection with the Arizona Public Service concerning which you testified yesterday? A. Counsel, may I make a statement as to running differences with all three States, which are not serious, they are lawyer's differences, that is—

Mr. McKevitt: I object to the characterization

Mr. Wiener: I can state Williams vs. Lee. The Williams vs. Lee involved the right of Lee—

The Court: Is that L-e-e, or L-e-a?

Mr. Wiener: It is Lee, L-e-e, Your Honor. Lee was an Indian trader on the Navajo Reservation under a section, the O section—

Mr. McKevitt: I am sorry but I didn't hear.

Did you ask counsel to explain it?

The Court: Well, I would like to hear a little about it.

Mr. McKevitt: I thought he was volunteering.

Mr. Wiener: No, I am not.

The Court: Since it has been mentioned, it will probably save me reading it.

Mr. Wiener: I think I can state it in such a way that it will pass muster in Your Honor's classroom as well as your courtroom.

825 Lee was an Indian trader on the Navajo Reservation. Under the provisions of the revised statute still in force, every Indian trader must be licensed by the Secretary of the Interior. Lee was so licensed. He sold goods to Williams and Mrs. Williams, who were Navajo Indians, and they didn't pay.

Lee thereupon brought suit against the two Williamses in a State Court of Arizona.

The Navajo Tribal Council, and one of Mr. Littell's subordinates, appeared in the Arizona litigation and contended that the State Courts had no jurisdiction to entertain an action against a Navajo Indian.

This claim was rejected by the State Courts, and Mr. Littell brought the case to the Supreme Court as General Counsel, and he briefed and argued the case to the Supreme Court, and the Supreme Court in *Williams vs. Lee*, 358 U.S., although I don't remember the page at the moment, held that Indians on reservations were exempt from State jurisdiction, and that Lee's remedy was to sue the Williamses in a Navajo Tribal Court.

Now, that briefly is the case.

Mr. McKevitt: Your Honor, may I add that the United States Department of Justice also appeared in the case on the jurisdictional matter. This is not the type of controversy we were talking about.

826 The Court: All right, let us proceed.

By Mr. Wiener:

Q. One of the objects of your fights as listed by Mr. DeRose was labor.

Will you state to the Court what, if any, fights or controversies or litigation you had on behalf of the Navajo Tribe with any labor organizations? A. It is difficult to simplify this complex problem, but in essence it can be stated, I believe fairly, this way:

The Navajo Tribe after holding hearings before the Advisory Committee at which all unions were invited to ap-

pear and employers were invited to appear, did in fact pass a right-to-work statute based up the Arizona statute and the Utah statute.

This arose from the utter inability to comprehend the refinements of unionization in its bigger organized sense.

Mr. McKevitt: I object again to the conclusion. The witness is testifying as to why somebody else did something.

Mr. Wiener: That may go out.

The Court: All right, I will strike that.

By Mr. Wiener:

Q. The Navajo Advisory Committee or the Tribal Council adopted this right-to-work— A. Adopted this statute, and then Mr. McPherson presided as far as the Legal Department was concerned, and he presided at Window 827 Rock, on the legal aspects of this hearing, so I haven't the full details, but it ended in litigation.

Q. Here in the District of Columbia? A. Sir?

Q. Here in the District of Columbia? A. Here in the District of Columbia, yes.

Mr. Wiener: That was the case, Your Honor, if I may anticipate a question, that was a case decided by our Court of Appeals here in which the Supreme Court denied certiorari, where the Navajo Tribe urged the contention that the National Labor Relations Act did not apply within the boundaries of the Navajo Reservation, and that contention was rejected, both by the Court of Appeals, which rejected it in substance, and by the Supreme Court, which denied review.

Do I state that correctly?

The Witness: This is correct. I would like to add a postscript to that issue, namely, that the unions fought the preference right of the Navajo employment.

I succeeded in getting approval—

Mr. McKevitt: I object, Your Honor.

The Court: Well, what was the result?

The Witness: The result, yes. The Secretary finally approved a preference for local residents, for the construc-

tion program and schools and other matters on the reservation.

We could not prefer the Navajos because of the
 S28 nondiscrimination clause in all Federal contracts,
 but this finally was recognized, and the unions really
 hated this business, and they fought it.

Mr. McKevitt: I object, Your Honor, and ask that be stricken.

The Court: That will be stricken as a volunteered statement.

The Witness: That preference clause for local residents was one of the main causes of conflict.

By Mr. Wiener:

Q. And because there were more local Navajo residents than local non-Navajo residents—

Mr. McKevitt: I object to the leading, Your Honor.

The Court: Well, that is kind of leading.

Mr. Wiener: All right, Your Honor.

Q. Now, what was the controversy on the Navajo Development Corporation? A. Well, this was a proposal that was promoted in the Navajo Council and proposed—

Q. When? A. Very early, almost at the outset of the Nakai administration, and trying to state it as simply as I can, it was, as usual in these days, not shown—

Q. No, please, Mr. Littell. I don't care whether it
 S29 was shown, what was it? A. When it finally came to me, when I finally did get—

Q. Not, when you saw it. What was the proposal? A. The proposal was that the Tribe would give to this Navajo Reservation Development Corporation exclusive rights to lease the business sites on the reservation for 25 years, renewable for 25 years.

Q. Did you draft that proposal? A. I certainly did not.

Q. Did you oppose that proposal?

Mr. McKevitt: Your Honor, I don't want to be too technical but I think the documents are the best evidence.

The Witness: Here it is. I have it.

By Mr. Wiener:

Q. Have you got it? A. Yes.

Q. Very well. You have handed me a paper headed, Navajo Reservation Development Proposal, which is stamped at the bottom, Received Tribal Resources Division, August 6, 1963. Is that it? A. That is it.

Mr. Wiener: Very well, will you mark this for identification, please, as Plaintiff's Exhibit AB?

(The document was marked Plaintiff's Exhibit AB for identification.)

S30 The Court: What is the title of that?

The Witness: Navajo Reservation Development Corporation.

Mr. Wiener: Navajo Reservation Development Proposal, presented by the Navajo Reservation Development Company.

The Court: Very well.

By Mr. Wiener:

Q. Do you have a second copy? A. No, sir.

Q. Now, this Plaintiff's Exhibit AB for identification, Mr. Littell, the Navajo Reservation Development Proposal, does that contain a resolution that was presented to the Council? A. No, this is—no, it does not. This is the proposal itself to go to the Council.

Q. Did the Council adopt it? A. The Council adopted it by a vote of 21 in favor, 31 abstaining, 8 against, on August 20th, and rescinded that decision on August 30th.

The Court: What year was that?

The Witness: 1963.

By Mr. Wiener:

Q. Did you oppose the proposal? A. When I was finally consulted about, yes.

Q. On what grounds did you state your opposition to the proposal? A. On the ground that it gave a virtual

S31 monopoly to one organization over the business development of this vast reservation.

Secondly, on the grounds, and I am simplifying these statements, secondly, on the grounds, that there was an alleged 40 per cent participation in profits by the Navajo Tribe, but no participation in the Board, and the Tribe would have somebody who it could consult with and to talk with these people, that control passed completely from the Navajo Tribe, and it would give a virtual monopoly of the economic development on the reservation.

Mr. Wiener: I will offer this in evidence.

Mr. McKevitt: Your Honor, on the last question of his, the reason that he stated purports to be a characterization.

The Court: Well, the document will speak for itself.

Mr. McKevitt: And my objection is that I see no connection between this and the issues in the case.

The Court: I will overrule it. It will be received.

(The document previously marked for identification as Plaintiff's Exhibit AB was received in evidence.)

By Mr. Wiener:

Q. Now, does this recitation, Mr. Littell, that we have been going over this morning conclude the list of everyone who Mr. DeRose said you were fighting? A. I am not
S32 sure. I would have to hear his statement here.

Q. Have we omitted any adversary listed by Mr. DeRose? A. I can't recall, counsel. I was a little overwhelmed with his statement, and I would have to read it.

Mr. McKevitt: I object, Your Honor.

The Court: All right, that will go out.

By Mr. Wiener:

Q. Now, these controversies you had detailed, were any of them actuated by anything other than what in your opinion was in the best interests of your client, the Navajo Tribe of Indians?

Mr. McKevitt: I object to that question, Your Honor.

The Court: I remember Mr. DeRose. What did he say?

Mr. Wiener: In substance, Mr. DeRose said that Mr. Littell was always fighting everyone, and he said he was fighting industry, he was fighting labor, and he was fighting the States, and he was fighting industry, and he was fighting the banks.

The Court: Well, in what part of his testimony did he talk about that?

Mr. Wiener: Well, I think it was where he explained in response to questions by Mr. Pittle, on direct examination, about his first talk with Mr. Nakai and Mr. and Mrs. Denet-sone, and how they came to him and said, We need help against this terrible man Littell, who is fighting
833 everybody.

The Court: This was right after the election?

Mr. Wiener: This was right after the election.

The Court: In '63?

Mr. Wiener: Yes, sir. I think this is a proper question on the foundation laid this morning.

The Court: I will let him proceed.

Mr. Wiener: Will you read the last question?

(The last question was read by the reporter.)

The Witness: No, indeed.

By Mr. Wiener:

Q. Now, let us go back to the period preceding the Navajo Tribal election on 4 March, 1963.

Were you aware of the campaign? A. Yes.

Q. Were you aware of the fact, many times testified to in this proceeding, that one of the points in Mr. Nakai's platform was your elimination as General Counsel of the Navajo Tribe of Indians? A. Yes.

Q. When did you first meet Mr. Nakai, Mr. Raymond Nakai, face to face? A. In his office the morning he took office, April 15th, 1963, at 8:15 a.m.

Q. Now, who was there? A. The only man, I am
 834 sure it was Frank Luther, I didn't know him at that
 time, but I am sure it was Frank Luther.

Q. So that the three of you there, you, Mr. Nakai, and
 Mr. Luther? A. That is my recollection.

The Court: How do you spell that name?

The Witness: L-u-t-h-e-r.

By Mr. Wiener:

Q. Now, what did you say to Mr. Nakai and what did
 Mr. Nakai say to you? A. I said that I felt like a man who
 had been tied to a tree with his hands behind him and
 gagged during this campaign, hearing himself maligned
 all over the reservation, and unable to reply.

Q. What did Mr. Nakai say? A. He said: Mr. Littell,
 I said a great many things in this campaign that I would
 rather not have said.

Q. What else was said? A. Then we proceeded to dis-
 cuss the legal work. We talked until quarter of nine, which
 was nearly the time he had to go to Council.

Q. Now, did you at the conclusion of that half hour con-
 ference make an appointment for another meeting? A. Yes,
 we both agreed. It was essentially a friendly discussion,
 and we both agreed to—

835 Mr. McKevitt: I object to the characterization of
 the discussion.

The Court: Well, there has been very much said by both
 sides about this controversy. I don't think it does any harm,
 or any good, one way or the other.

It is his impression of whether it was a friendly discus-
 sion or not. It is not too important.

The Witness: Well, we both agreed that there was too
 much to cover in such a short interval, and he was under
 great pressure, there were a lot of people waiting in his
 outer office, and with the Council coming up, and I said:
 I think we should adjourn this until dinner, and he agreed.

By. Mr. Wiener:

Q. Did you so adjourn it? A. We did.

Q. When did you have your dinner meeting, and where, and who was there? A. We had it that very night about 7 o'clock, and when he came, I think it was from the lobby he called, and he said: I brought Denetsone.

I had not invited Denetsone, but I sent to room service for another service, and the two of them came over, and we talked until 2 o'clock in the morning.

Q. Now, what if any discussions were had between you— or what time did the discussions begin, by the way?

836 A. About 7 o'clock.

Q. Without in any way trying to reconstruct that seven-hour conversation, what if anything was said by you, by Mr. Nakai, or by Mr. Denetsone concerning your continuation under your contract as Claims Attorney and General Counsel of the Navajo Tribe of Indians? A. Well, narrowing it to that point, Mr. Denetsone did the talking really, most of it, and he suggested that I resign as General Counsel and merely keep claims.

Q. And what did you say to that suggestion? A. Absolutely not, that the two went together, they were a seamless fabric as far as legal work is concerned, and I would not consider it.

If I went out of one, I would go out of both.

Q. And what did Mr. Nakai say concerning that suggestion by Mr. Denetsone? A. Well, he did not make himself very clear about that, but he listened with interest and obviously—

Mr. McKevitt: I object to this. This is not responsive to what did he say.

The Court: What did he say?

The Witness: I can't remember that he said anything one way or the other, but he did seem to concur with Mr. Denetsone. That is as far as I can go.

Q. Was the budget of the Legal Department discussed at that meeting? A. No, sir, but the—yes
837 and no.

No, I would say the budget was not. My report to the Council was discussed.

Q. Was anything said by any of the three of you concerning the substance matter of what became Plaintiff's Exhibit Y, Amendment 13 to your attorney contract? A. No, not at that time.

Q. Now, when you and Mr. Denetsone and Mr. Nakai parted at 2:00 a.m., was it in an atmosphere of friendliness or hostility? A. Of course, we could not have lasted until 2 o'clock if it was not in a friendly discussion.

Q. What was the atmosphere, friendly or what? A. friendly.

Q. Now, when did you next consult with Mr. Nakai? A. I can't give you the precise date without going back to my notebook, but there were—

Q. Approximately? A. There were between that date and May 7th, let us say in April, I made every effort to take Mr. Nakai—

Mr. McKevitt: I object again to his, I made every effort.

The Witness: Well, I did arrange.

The Court: Just what you did? At that time what
838 did you do?

The Witness: I arranged with Mr. Nakai to visit the Legal Department, the Legal Aid Department, the Land Investigation Division, to show him the accumulation of materials in the Tribe's Land Investigation Division, where Ed Plummer, a Navajo, was in charge, and doing splendid work for the Tribe, and the Legal Aid people, and each office of the Legal Department.

By Mr. Wiener:

Q. Now, how many conferences were involved as nearly as you can remember in this demonstration? A. Oh, at least a half dozen, I would say.

Q. When was the subject matter of Amendment No. 13 first discussed with Chairman Nakai? A. I honestly cannot remember, but it came up, of course, with the legal budget,

and this was the budget session of the Council which was in session.

The Court: Let me see if I follow you.

Was this Amendment 13 that had to do with the proposed raises?

Mr. Wiener: Of salaries.

The Court: Of the other assistants of Mr. Littell?

Mr. Wiener: Yes, Your Honor, that is correct.

Mr. McKevitt: Your Honor, I move that the last answer be stricken because it was not responsive at all.

839 The Court: Well, I was just seeking some information. I was thinking it was the same amendment.

Mr. Wiener: Yes, Amendment No. 13 is the one that raised the salaries of five, I think, of Mr. Littell's assistants, all of whom have resigned, and the amendment has never been acted on.

The Court: He referred to this this morning, I think.

Mr. Wiener: Yes, Your Honor.

Mr. McKevitt: Amendment No. 11 was passed in 1962, and they are talking about 1963.

He asked him when it was mentioned, and he said it was mentioned at first in connection in with the budget but that is not responsive. He didn't say it was.

The Court: Well, just strike that out.

When was it mentioned?

By Mr. Wiener:

Q. When was the subject matter of Amendment 13, namely, the raises for five of your assistants, mentioned to Mr. Nakai? A. It was as nearly as I can remember specifically mentioned to Mr. Nakai when I went to him around about the first of May, saying, I must get on if you want me to report to the Council, because the hearings of the Indian Claims Commission begin Monday, May 13th, and I must fly back to Washington.

840 Q. Well, now, did you then discuss the subject matter of Amendment 13 with Mr. Nakai? A. I dis-

cussed it, and merely as an incident to my General Counsel's report to the Council, as one of the items of the budget, for the entire legal budget.

Q. Will you turn to Plaintiff's Exhibit A, page 164?

My question is: When actually was that report of yourself as General Counsel submitted to the Navajo Tribal Council? A. From May the 7th to May the 10th.

Q. And when was your legal budget presented to the Navajo Tribal Council? A. At the same time, it was under discussion, the budget was before the Council at that time.

Mr. McKevitt: I am sorry, I didn't get the page number.

Mr. Wiener: Page 164.

The Court: This is the report of the Council meeting of April 15, 1963?

Mr. Wiener: Yes, Your Honor.

By Mr. Wiener:

Q. Now, how long did that meeting last, Mr. Littell?

A. Well, it lasted well into June or July. I don't remember. I would have to look it up.

Q. Well, it wasn't just a one-day, one-shot affair?

S41 A. No, the budget session is a long session.

Q. I show you Plaintiff's Exhibit Q, Mr. Littell, which is an extract from the minutes showing the approval by the Navajo Tribal Council on May 10th, 1963, of your legal budget.

My question is: Where in time relation to the approval of this budget, did you take up with Mr. Nakai the matter of Amendment 13 and the raises for your five assistants?

Mr. McKevitt: I object to that. He has not testified he took it up with Mr. Nakai.

The Witness: Yes, I did.

Mr. Wiener: I think he did.

The Court: First of all, I can't say one way or the other, frankly. I don't remember.

Rephrase the question.

By Mr. Wiener:

Q. Did you take up with Mr. Nakai the subject matter of Amendment 13? A. Yes. I endeavored to say that when I urged upon him the urgency of making my report, because everybody was standing in line, the heads of the divisions, including the Legal Division, to make their report to the Council, a new Council, which required considerable explanation.

I urged upon him at that time, which was probably about a week in advance, I said May 1st, in other words, to
 842 get it on, and I pointed out this among other things that would come up in the tribal budget, in the Legal Department budget.

Mr. McKevitt: I object to this. Your Honor. I can't see the relevancy. Amendment No. 13 was passed in 1962.

Mr. Wiener: No, I beg your pardon, 1963, Mr. McKevitt. You don't know your record. The 30th day of June, 1963.

The Court: All right, let us proceed.

By Mr. Wiener:

Q. Now, when the legal budget was passed on May 10th, were the relations between you and Mr. Nakai friendly or hostile? A. They were friendly.

Q. When Amendment No. 13 was passed, and this is dated—

Mr. McKevitt: Your Honor, I ask that the last answer to the last question be stricken. I don't think Mr. Littell can characterize what the relationship with Mr. Nakai is.

The Court: Well, if you want to explain it, if you want to get it, what did he say to you, and let the Court draw its own conclusions. And what did you say to him, as the case may be.

By Mr. Wiener:

Q. In what terms were you addressing yourselves on or about May 10, when the legal budget was approved?

843 A. At this suggestion on a first name basis.

After we finished the tour of the Legal Depart-

ment, we stopped in front of the administration building, and he put out his hand and said: I am going to take the liberty of calling you Norman.

And I said: That's fine, I will call you Raymond.

And he said: It is Ray. And I said: Fine, Ray.

He said: We will be seeing a lot of each other.

And we conferred on a number of things in those days.

Q. Very well. Now— A. In my office and in his.

Q. Now we get to Amendment 13, which is dated June 30th, 1963.

Were you then still on a Norman and Ray basis with Chairman Nakai? A. What was the date?

Q. June 30th, 1963, when Amendment 13 was adopted or dated? A. No.

Q. What happened in the meantime to change the relationship? A. After I flew back to Washington to handle those hearings before the Indian Claims Commission—

Q. About what time? A. I am saying, now, on Monday, that week end, and I appeared before the Claims
844 Commission that week, Monday May 13th.

I had to fly back to the Council because of various pressing matters.

Q. When did you return to Window Rock? A. I think it was about June 6th. I would have to check my record, but that is my recollection. It was about June 6th.

Q. What was the next matter that you took up with Chairman Nakai after your return? A. The housing ordinance was then in a state of sharp controversy before the Council. It had broken out on May 31st as a matter of discussion.

Q. Do you have a copy of the housing ordinance? A. No, sir, not with me, but I can easily get one.

Q. We will save that for after.

What was the nature of the controversy over the housing ordinance? A. As simply as it can be put, this was an exercise—

Q. Well, briefly. A. Whether the Tribe had power to create an organization which had the attributes of a cor-

poration, in that if it were sued for its own acts, the suit would not reach through to the whole Navajo Tribe and all its assets.

Q. Now, this is the matter that you discussed with Mr. Pittle yesterday? A. That is right. That is the main
S45 thesis of the problem.

Q. Were you and Mr. Nakai in agreement on that ordinance? A. No.

Q. Was the ordinance passed? A. The ordinance was finally passed.

Q. Well, had the ordinance been submitted to you or to your knowledge to anyone in the Legal Department prior to its passage? A. Not by Mr. Nakai.

It was secured by members of the Council. I believe it was Mrs. Wauneka that gave it to me, but I don't remember just who.

They all had some doubt.

Q. Did Mr. Nakai consult you concerning that housing ordinance? A. Not all all, except before the Council.

Q. Was there a debate before the Council concerning the housing ordinance? A. Indeed so.

Q. Were you present at that debate? A. Yes.

Q. Were you present at that debate before the adoption of the housing ordinance? A. Yes.

Mr. McKevitt: Your Honor, I want to put a general
S46 objection on the ground of relevancy. The issues in this case are the charge of unclean hands, that Mr. Littell didn't disclose that Healing vs. Jones was a claims case, and that he used tribal General Counsel lawyers on claims, and the other charge in the raises in salaries, and this has nothing to do with the issues, and I think we are getting far afield.

The Court: Well, I can't tell yet. I don't know what they are trying to develop, or what inferences or deductions are to be drawn from the testimony. I don't know yet.

Mr. Wiener: Do you wish to hear me at the bench, Your Honor?

The Court: Yes, I will hear you.

Mr. McKevitt: Your Honor, this is new. We called this witness. We called him as an adverse witness, and I don't know whether it is his rebuttal. These are new issues.

The issues we made were just three. I don't know of any new issues introduced by either the cross examination or our examination.

The Court: But you haven't finished your case yet?

Mr. McKevitt: No, sir.

The Court: Didn't you say something about letting testimony go in and have it adopted as part of your case?

Mr. Wiener: But this is cross examination to the defendant case.

Now, I might say this—

847 Mr. McKevitt: I don't think this is cross examination when we called him as an adverse witness. You are putting him on as your witness.

Mr. Wiener: This is further cross examination.

On Monday, Mr. Pittle started to talk about the election campaign by Mr. Nakai.

And Your Honor may remember that I got up and in language that may have been perhaps unnecessarily sharp, I said, that this was utterly irrelevant, because what the election campaign did, or what was said there would have no bearing on the power of the United States to terminate a contract, and after considerable discussion Your Honor determined to open the gates.

Mr. Pittle put on Mr. Nakai, and Mr. Nakai talked about his election campaign, and he was going to get rid of Littell.

Mr. Pittle then put on the Denetsones, who talked about what a terrible person Mr. Littell was.

Mr. Pittle then put on Mr. Barry DeRose, who though he may or may not have been a campaign manager for Secretary Udall, was a campaign manager for Nakai and the Denetsones.

Mr. McKevitt: I object to tht, Your Honor.

The Court: This is his characterization.

Mr. Wiener: And Mr. DeRose then under questioning by Mr. Pittle developed a line of reasons why Mr. 848 Littell was deficient in his powers.

Then Mr. Pittle called Mr. Littell.

And now, I am on cross examination and going over the points that Mr. Pittle made, to show a picture of the relationship between Mr. Littell and Mr. Nakai over the election campaign.

And I am now about to get to the point where their relations deteriorated, and it seems to me this is all entirely relevant to the case that the defendant has made.

Now, if Your Honor were to say that all of the evidence adduced by the defendant up to now was irrelevant, we would be in a different situation, but since their evidence has been submitted, we are entitled to rebut it, and on that basis I am saying here that it is relevant to the points made on Mr. Pittle's examination.

After all, we have here a situation of very serious charges of fraud made against a party. In that kind of case, I think that on the cross examination we are entitled to very considerable latitude in rebutting insinuations bandied about this courtroom.

Mr. Pittle: May I say, Your Honor, that we are the defendant in this case, and that they filed a complaint in which the plaintiff made an attack by charging certain wrongful actions by the Secretary of the Interior. We have pleaded our defense in the answer.

849 The plaintiff chose to rest on the documents, on exhibits, and he chose not to put on any affirmative testimony, and therefore we had the double burden of rebutting documentary evidence, because there would be no witnesses presented whom I could cross examine.

At that point, I had to put my witnesses on to make an affirmative case in support of the defendant, which shows that the attack started with the plaintiff, that the charge of fraud is substantiated, and that this was a political squab-

ble between two different groups within the Tribe, and that this is a vendetta between the Secretary of the Interior and Littell, who is General Counsel for the Tribe, that this is a political battle between them that centers around a small dissident group. This is a serious problem in administration of Indian affairs of a Tribe whose individuals are very poor, but whose property is very valuable, and we are losing sight, it seems to me, that the burden has shifted because I am defending the case.

The Court: Well, what the plaintiff is attempting to show, that without justification or cause or good reason, or probable cause, or whatever you want to call it, his contract was suspended, and they had no right to do it, or statutory authority to do it.

And this just becomes material, I suppose, as leading up to this breach between the two men. What caused
850 the breach? I am a little interested to find out for my own benefit because I am going to have to decide this case.

Mr. Doyle: I want to say, Your Honor—

The Court: Well, they had a hot campaign, and if you believe the plaintiff—and I haven't made up my mind about what I am going to do—but they got along pretty well, and Mr. Nakai might deny that, but if you believe them, they were on friendly terms after that campaign.

And then comes the Housing Authority business. Now, something must have led up to this breach. What caused them to fall apart? I don't know what caused them to fall apart, but the situation was that they became enemies, if that is the word to use, and I don't know.

There has been some pretty rough language used on both sides, and this is reflected all through the record. It is too bad it occurred, but it is in there.

Mr. Doyle: The only thing I had in mind, Your Honor, to add, and since everybody talked but me, I should get in here.

When we started the case, our idea was on a crisp legal

The Court: This is his characterization.

Mr. Wiener: And Mr. DeRose then under questioning by Mr. Pittle developed a line of reasons why Mr. 848 Littell was deficient in his powers.

Then Mr. Pittle called Mr. Littell.

And now, I am on cross examination and going over the points that Mr. Pittle made, to show a picture of the relationship between Mr. Littell and Mr. Nakai over the election campaign.

And I am now about to get to the point where their relations deteriorated, and it seems to me this is all entirely relevant to the case that the defendant has made.

Now, if Your Honor were to say that all of the evidence adduced by the defendant up to now was irrelevant, we would be in a different situation, but since their evidence has been submitted, we are entitled to rebut it, and on that basis I am saying here that it is relevant to the points made on Mr. Pittle's examination.

After all, we have here a situation of very serious charges of fraud made against a party. In that kind of case, I think that on the cross examination we are entitled to very considerable latitude in rebutting insinuations bandied about this courtroom.

Mr. Pittle: May I say, Your Honor, that we are the defendant in this case, and that they filed a complaint in which the plaintiff made an attack by charging certain wrongful actions by the Secretary of the Interior. We have pleaded our defense in the answer.

849 The plaintiff chose to rest on the documents, on exhibits, and he chose not to put on any affirmative testimony, and therefore we had the double burden of rebutting documentary evidence, because there would be no witnesses presented whom I could cross examine.

At that point, I had to put my witnesses on to make an affirmative case in support of the defendant, which shows that the attack started with the plaintiff, that the charge of fraud is substantiated, and that this was a political squab-

ble between two different groups within the Tribe, and that this is a vendetta between the Secretary of the Interior and Littell, who is General Counsel for the Tribe, that this is a political battle between them that centers around a small dissident group. This is a serious problem in administration of Indian affairs of a Tribe whose individuals are very poor, but whose property is very valuable, and we are losing sight, it seems to me, that the burden has shifted because I am defending the case.

The Court: Well, what the plaintiff is attempting to show, that without justification or cause or good reason, or probable cause, or whatever you want to call it, his contract was suspended, and they had no right to do it, or statutory authority to do it.

And this just becomes material, I suppose, as leading up to this breach between the two men. What caused
 850 the breach? I am a little interested to find out for my own benefit because I am going to have to decide this case.

Mr. Doyle: I want to say, Your Honor—

The Court: Well, they had a hot campaign, and if you believe the plaintiff—and I haven't made up my mind about what I am going to do—but they got along pretty well, and Mr. Nakai might deny that, but if you believe them, they were on friendly terms after that campaign.

And then comes the Housing Authority business. Now, something must have led up to this breach. What caused them to fall apart? I don't know what caused them to fall apart, but the situation was that they became enemies, if that is the word to use, and I don't know.

There has been some pretty rough language used on both sides, and this is reflected all through the record. It is too bad it occurred, but it is in there.

Mr. Doyle: The only thing I had in mind, Your Honor, to add, and since everybody talked but me, I should get in here.

When we started the case, our idea was on a crisp legal

basis that it was a question of power, that the documents are sufficient and the thing should be narrow.

My good friends convinced you otherwise, and they went ahead.

Then they threw in this most amorphous thing I know of, this charge of unclean hands. So we go back to the matter of the genesis of their charge of unclean hands, and in view of the issues raised of unclean hands by our friends, it went very broadly, and I believe this should be admitted, and that is relevant.

The Court: I think the case has developed to the point, that where there may have been a lot of narrow issues, I think now that it has been opened up wide to show this whole picture.

I can't help but thinking, that maybe some day if this case goes to the Court of Appeals, I think you ought to have everything in the record, so that they will be in a better position to determine and decide the matter.

And I really believe that the Court of Appeals from their opinion—and that is the reason I ruled with the defense—thought that this case ought to be tried on the merits.

There must be some reason why these two men fall apart, and I would like to know what it is.

Mr. Wiener: How long will you sit today, Your Honor?

The Court: I will suspend now.

Is there any objection to that?

Mr. Wiener: No, sir.

Mr. McKevitt: No, sir.

(Thereupon, at 12:10 o'clock p.m., an adjournment was taken until 10 o'clock a.m. on Monday, February 8, 1965.)

• • • • •

886 Washington, D.C.,
Monday, February 8, 1965.

• • • • •

887

PROCEEDINGS

The Court: All right, you may proceed.

Mr. Wiener: Mr. Littell, will you resume the stand, please?

Thereupon

Norman M. Littell

resumed the witness stand pursuant to the adjournment and testified further as follows:

Cross Examination (resumed)

By Mr. Wiener:

Q. Mr. Littell, I believe when the Court adjourned on Friday, we were discussing the Housing Authority resolution. Do you have with you a copy of that resolution? A. I do, Mr. Wiener.

Q. Can you conveniently take it out of your file? A. I can. I regret to say that there was not an opportunity to duplicate it. It is very long and I will do so later.

Mr. Wiener: Will you mark this for identification?

(The document was marked Plaintiff's Exhibit AC for identification.)

By Mr. Wiener:

Q. I show you Plaintiff's AC for identification, Mr. Littell, and will you tell me whether that housing resolution was adopted by the Council? A. It was.

Q. Do you have a form of the resolution in which it was adopted, or is this AC, does that represent that form? A. Frankly, I haven't located it. I believe that there was a resolution on top of this, but it is pro forma. The essential thing is this ordinance, this is it, minus my marginal scratchings there. I will get you a clean copy.

Mr. Wiener: And I will ask permission to make the appropriate substitution, Your Honor.

The Court: Very well.

By Mr. Wiener:

Q. Do you recall approximately when this housing resolution was passed by the Council? A. I am quite sure it was June 14th.

Q. On June 14th when that resolution was passed, were you at your normal position at the General Counsel's table in the Council Chamber? A. No, sir; I had returned to Washington, D.C.

Q. Do you know whether any other lawyer was there advising the Navajo Tribal Council on the subject matter of this housing resolution? A. I believe that Mr. Schifter was still there.

Mr. McKevitt: I object to this, Your Honor, unless he knows.

The Court: Yes, I will sustain the objection, unless
SS9 he knows.

By Mr. Wiener:

Q. Do you have anything in the minutes indicating whether or not another lawyer addressed the Council on the subject matter of that resolution? A. Not on that date. That is, I haven't looked. I will qualify it to that extent.

Q. Do you have copies of any minutes indicating that any lawyers, other than yourself, addressed the Navajo Tribal Council on the subject matter of the housing authority resolution on that or any other date? A. Oh, yes, indeed.

Q. Do you have that with you? A. There is a portion on page 245 of the meeting of June 6, 1963.

Mr. Wiener: The document which the witness has handed me I will ask be marked as Plaintiff's Exhibit AD for identification.

(The document was marked Plaintiff's Exhibit AD for identification.)

Mr. Wiener: Plaintiff's Exhibit AD for identification purports to be an extract from the Navajo Tribal Council minutes of June 6th, 1963, at page 245.

By Mr. Wiener:

Q. My question is: Were you present at that time?

890 A. Yes, sir.

Q. Now, I believe you testified but to make sure I will ask you again, Did you on or after the time of the passage of the Housing Authority resolution take up what you considered to be the legal questions involved in that resolution with Chairman Raymond Nakai? A. No. At the Council meetings.

Q. You took those up at the Council Meetings? A. Yes, sir.

Q. Will you briefly state the respective positions in so far as the legal questions were concerned?

Mr. McKevitt: I object, Your Honor. He should give his own position.

By Mr. Wiener:

Q. You did have a conversation with Mr. Nakai; is that correct, concerning the housing resolution?

Mr. McKevitt: He just testified he didn't.

The Witness: I said before the Council, open discussion before the Council, Mr. Wiener.

By Mr. Wiener:

Q. Now, then, state when and where and who was present? A. The debate on the housing lasted for some days, and without going back to the minutes, I can't give you those precise dates, as I probably should be able to do, but it was in May and June.

891 As you see from the excerpt you have taken, that was June the 6th, and the debate was going on, and it was practically at its highest point then.

Now, it was during that early part of June that I would say that the matter had its most concentrated consideration and I appeared to express my views before the Council.

Q. Were those views in favor or in opposition to the resolution. A. In favor of the ordinance but in opposition to certain clauses of it.

Q. Notwithstanding that opposition, however, the Council passed a resolution as it had been drafted; is that correct? A. Yes.

Q. Did you thereafter communicate your views to Mr. Nakai in a telegram or by letter? A. Before it was passed by the Council, counsel.

Q. Was this before or after you made your oral appearance before the Council? A. After I made my oral appearance, I returned to Washington and consulted with the head of the Housing Authority.

Q. To shorten it, it was in consequence of this conference that you had with the Housing authorities in Washington that you sent the telegram to Mr. Nakai?

Mr. McKevitt: I object to that question.

The Witness: Yes.

892 The Court: I will hear the objection. Just one at a time, please.

Mr. McKevitt: I object to the question as leading.

Mr. Wiener: I know it is leading but I am trying to shorten it up.

The Court: Maybe you can correct me if I am in error, but this witness was called as an adverse witness by the defendant; correct?

Mr. McKevitt: That is right.

The Court: My understanding is he is now being cross examined?

Mr. McKevitt: Oh, no, Your Honor.

The Court: Or are you calling him now out of turn as your witness? What is the situation?

Mr. Wiener: I am cross examining the witness called by the defendant. I have not insisted on my right to cross examine through leading questions.

I admit the question is leading but I hoped we would be able to shorten it because I think there is no dispute.

I am not putting words in this witness' mouth.

The Court: Well, I don't see that there is any need to recall him later, as far as the Plaintiff's case, if it can be

done now, so that we can get the sequence of this testimony from beginning to end.

893 On cross examination, as you know, you are permitted to ask leading questions.

Mr. McKevitt: He is on cross examination for us, not for them.

He is still their witness and we called him adversely. It is not a change from the adverse part, it is just a reverse type of witness.

The Court: I understand.

Mr. McKevitt: He has to take him on direct.

Mr. Wiener: I admit the question is leading. As I said, I don't insist on any supposed right to ask leading questions, but I hoped it would be able to shorten it.

The rule is that leading questions may be asked concerning undisputed matters, and I consider that this was an undisputed matter.

The Court: I will let him answer. Let us proceed. It may shorten this up.

Mr. Wiener: Will you read the question?

(The last question was read by the reporter.)

The Witness: Yes.

By Mr. Wiener:

Q. Do you have a copy of that telegram? A. It is in evidence, counsel. Counsel for the Government brought out this telegram, I believe, June 14th.

894 Q. We don't have it. A. I can't remember the number of it. It disappeared from the desk here when I explained this before in answer to the Government's questions.

I, of course, can have another copy reproduced from my file.

The Court: Just for the record, gentlemen, I presume when the witness states June 14th we are now talking about the year 1963?

The Witness: Yes, sir.

Mr. Wiener: Yes, Your Honor.

The Court: Without repeating 1963 all the time.

By Mr. Wiener:

Q. Now, this is a copy of a telegram from you to Mr. Nakai in connection with the housing resolution? A. Yes.

Did you find it?

Q. No, it is not in evidence, neither in evidence nor marked for identification.

The Court: Do you have a copy?

Does he have a copy?

By Mr. Wiener:

Q. Do you have a copy? A. In my file, and I will have it reproduced, but I regret that it disappeared from this desk, counsel.

It is not in my file.

S95 Mr. Wiener: Well, I will try to proceed, Your

Honor, as best we can without the document.

Mr. McKevitt: We can get it later.

The Court: All right, get it later.

By Mr. Wiener:

Q. Do you recall the circumstances of the telegram which was sent? A. Yes, indeed.

Q. What was the substance of that telegram? A. The essence of the matter was that there was no hurry in approving this ordinance as represented to counsel, that an allocation of a certain number of housing units had been made to the Navajo Tribe. My recollection is that at that stage it was 100, but it might have been two or three hundred, I just can't remember.

And whatever they were, there was no hurry about the Tribe closing its commitment as represented to the Council, in the excerpt I have given you, because the Deputy Director of Housing said: Why, no, we have set aside for the Navajos, and we are going to hold them. You can use them until May 30th, 1964, if you have to. Of course, you

won't need that much time, but you have got all the time you want, and we are not going to cancel these allocations of housing units to the Navajo Tribe. You have got it.

Q. Now, did you receive a reply from Mr. Nakai to
S96 that telegram? A. None, none whatever.

Q. Did this telegram have any effect on your relations with Mr. Nakai? A. This I cannot say.

Q. Were your relations with Mr. Nakai following the sending of that telegram as friendly as they had been on the occasion when he suggested—

Mr. McKevitt: I object to the question as not stating the testimony—

Mr. Wiener: I beg your pardon? Well, in the first place I haven't finished the question.

In the second place, it is based on the testimony.

The Court: This is his opinion, of course, whether or not the relationship was as friendly?

Mr. Wiener: Yes, sir.

The Court: All right, let us proceed.

By Mr. Wiener:

Q. In your opinion, Mr. Littell, were your relations with Mr. Nakai as friendly following the dispatch of this telegram that you are going to produce as they had been on the earlier occasion, when, according to your testimony, Mr. Nakai had suggested that you two communicate on a first name basis? A. No. This broke down in June before the
S97 telegram, actually, because of my representations to the Council and of my legal opinion on the effect of this ordinance.

Q. Will you pin point, as nearly as you now can, the breakdown of your relations with Mr. Nakai—pin point in time? A. It was during this early period in June, I would say, when I resisted certain aspects of this ordinance, saying, in my opinion, they constituted a dangerous potential waiver of sovereign immunity for the Tribe.

Mr. McKevitt: I object to the answer as not responsive, Your Honor.

The Court: All right, I will let him proceed.

By Mr. Wiener:

Q. Mr. Littell, I show you Plaintiff's Exhibit R for identification, the first two pages of which are a resolution of the Advisory Committee of the Navajo Tribal Council, to suggest consultants for the new officers of the Navajo Tribe on a temporary basis, which was passed on May 31, 1963.

My question is: Was this Advisory Committee resolution brought to your attention on or about the time when it was enacted? A. No, I never saw it until somebody referred it to me informally. No, it wasn't brought to my attention.

Q. Were you invited by the Advisory Committee to meet with them at their meeting at which this resolution was adopted? A. No, sir, they did not.

Q. Now, turning to the second two pages of Plaintiff's R for identification, which purports to be a contract between the Navajo Tribe of Indians and Mr. Barry DeRose, and the firm of Strasser, Spiegelburg, Fried, Frank & Kampelman, by Mr. Allen Wurtzel, which is dated 17 June, 1963, did you see this contract contemporaneously or near or before its execution? A. No.

Q. Were you consulted concerning the terms of the drafting of that contract? A. Certainly not.

Q. When was this first brought to your attention? A. I can't remember exactly, but it was as nearly as I can remember in that June period when the other members of the Council learned about it and somebody showed it to me.

Mr. Wiener: I think this might be a good time to offer this in evidence, Your Honor.

Mr. McKevitt: Our only objection to that document is irrelevancy, Your Honor. It doesn't apply to any issues in this case.

The Court: Pass it up.

Now, let me hear you on the question of relevancy, Mr. Wiener. Why do you say it is relevant?

Mr. Wiener: We have had considerable testimony
899 by Mr. Barry DeRose, Your Honor, and by Mr. Nakai, and by Mr. Denetsone, concerning both the resolution and the contract, that this was a supersession in part of Mr. Littell that this documents the Nakai statement in the press release, which was attached to the papers for preliminary injunction, that he was looking to these two gentlemen for legal advice, and it is part of the picture, and it is relevant to the defenses made by the defendant here.

The Court: Let me just look at it. I am not going to read it all, but I will only read part of it.

This was approved on May 31st, 1963?

Mr. Wiener: The resolution was and the contract was dated June 17th, Your Honor.

The Court: Now, the first part of the resolution reads: Now, therefore, be it resolved that, one, the contract with the law firm of Strasser, Spiegelburg, Fried, Frank & Kampelman of Washington, D.C. and Barry DeRose, Esquire, of Globe, Arizona, attached hereto and made a part hereof, is approved, and the Chairman of the Navajo Tribal Council is authorized to affix his signature to it.

And then follows the contract itself; correct?

Mr. Wiener: Yes, Your Honor.

The Court: I suppose this is a copy of it.

Mr. Wiener: That is a copy.

The Court: All right, I can read this letter.

900 It is received, over your objection.

Mr. McKevitt: I just wanted to say briefly, Your Honor, that this is a suit against Secretary Udall, and this contract has nothing to do with Secretary Udall. It is simply based on some inference, and this goes only to DeRose and the counsel named, and it has absolutely nothing to do with this suit at all.

The Court: Well, on the question of inferences and deductions, I suppose there will come a time at the end of this trial when counsel may want to argue this case on both sides, and I intend to give you any time that is needed at least to argue the case.

I will receive it.

(The document previously marked for identification as Plaintiff's Exhibit R was received in evidence.)

By Mr. Wiener:

Q. Now, Mr. Littell, when were you first advised that this contract hiring or purporting to hire, and I say purporting to hire, Your Honor, because of certain legal questions that will become apparent later on, and when was this contract part of Plaintiff's R, purporting to hire Messrs. DeRose and Wurtzel as consultants, first brought to your attention?
A. I said I can't remember exactly, but—

Q. Approximately. A. But during the first two
901 weeks in June before I flew back to Washington.

Q. Now, did you following your return to Washington have a conference with Secretary Udall concerning, among other things, this contract, Plaintiff's Exhibit R?
A. Yes.

Q. And about when was that conference? A. The conference was on, two successive conferences, June 25th and 26th, unless it was the 26th and 27th. I believe it was, if I may refresh my memory.

Q. Certainly. A. It was June 26 and 27.

Q. Who was present at those conferences with the Secretary? A. Nobody but the two of us. The two of us were alone.

Q. Can you give us succinctly as possible, without too much detail, the respective positions of yourself and the Secretary in connection with this consultants contract with Messrs. DeRose and Schifter? A. Well, as your question implies, this is one of the incidents, and the date indicate that it followed the receipt of the telegram of June 25th

from the Advisory Committee, which is in evidence, a defendant's exhibit.

Q. Defendant's Exhibit 21. A. Defendant's Exhibit 21 I am referring to.

The Secretary said—

902 Q. Just a minute, please.

The Court: May I see that a minute, please?

Who sent this telegram?

Mr. Wiener: Mr. Nakai, Your Honor.

The Court: To the Secretary?

Mr. Wiener: He sent it to the Secretary, and it is either a summary. Your Honor, or a reasonably accurate transcript of Defendant's No. 1.

The Court: What was the date of the telegram?

Mr. Wiener: I think it is the 25th of June.

The Witness: June 25, 1963.

Mr. McKevitt: Your Honor, technically we should have put it in earlier, but we just overlooked it. It repeats what the resolution said.

The Court: This was sent on June 25th?

Mr. McKevitt: Oh, yes, and we are going to put it in.

The Court: Do you have copies of this?

Mr. McKevitt: I don't know, Your Honor.

The Court: I will take a few minutes to read it.

Mr. Wiener: And Your Honor may also like to look at Defendant's Exhibit 1, which is the resolution.

Mr. McKevitt: I have another copy of it.

The Court: Just let me look it over briefly before you proceed.

903 Mr. Wiener: And also Defendant's Exhibit 1.

The Court: Let me ask you a question as a point of information. As you appreciate, I didn't hear a lot of this evidence during the contempt proceeding, so a lot of this evidence is sort of new to me, you understand that?

Mr. Wiener: Yes, sir.

The Court: That is the reason I am asking the question. Now, this Advisory Committee, as I understand it, is appointed by Mr. Nakai?

Mr. Wiener: Yes, Your Honor.

The Court: And composed of nine members?

Mr. Wiener: Yes, Your Honor.

The Court: With those members also members of the Tribal Committee?

Mr. Wiener: Of the Tribal Council, yes, sir, Your Honor.

The Court: Before Mr. Nakai appointed the nine members of the Advisory Committee, did he have to get the consent of the Tribal Committee, or the approval of the Tribal Committee?

Mr. Wiener: The Tribal Council.

Mr. Pittle: Not at that time, Your Honor.

Mr. Wiener: Not at that time, no. They were a kind of executive council. Under the resolution passed October or November of last year, 1964, the Committee was now composed of 18 members, and they have to be approved by the Tribal Council.

The Court: And they have to be approved?

Mr. Wiener: At that time they were his personal appointments.

The Court: After the election of March, 1963, shortly after that, or some time later Mr. Nakai appointed the Advisory Committee?

Mr. Wiener: That is right.

The Court: Composed of nine members of his own selection?

Mr. Wiener: That is right.

The Court: All right, I understand that

Now, just a minute, please.

Now, is it in evidence who prepared this telegram to the Secretary?

Mr. Wiener: No, we don't have that. It is in evidence who prepared or helped draft the resolution.

The Court: What is the evidence on that?

Mr. Wiener: The evidence on that is Mr. DeRose put it in shape.

Mr. McKevitt: I am sorry, Your Honor, that is not the evidence.

Mr. Wiener: I beg your pardon?

The Court: I guess I had better look at the record on that. I don't think you two gentlemen can agree.

905 Mr. McKevitt: Pardon me, it may have been Mr. Denetsone.

Mr. Wiener: Now, if Your Honor please, I am sorry, but—

The Court: Well, I can find it later on. I presume you will indicate this or point it out in your findings of fact and conclusions of law.

This is a question I want to ask before I forget it. I spent some time at home yesterday going through Plaintiff's Exhibit A, which contains most of the pleadings, I think, in this case. This was the joint Appendix.

It seems to me that somewhere in this volume, in reading over some of these exhibits, and I didn't have time to read the whole thing, but there is some testimony to the effect that the Secretary suggested that Mr. Littell give up the General Counselship, or that is agree not to be General Counsel any longer, and then it was suggested, and I think this is somewhere in this appendix and it was suggested by the Secretary that he just become what is known as the Claims Attorney.

Mr. Wiener: Yes, Your Honor.

The Court: Is that correct?

Mr. Wiener: Yes, Your Honor.

The Court: I believe that is the testimony. Now, whether Mr. Udall said that, we will have to wait until we hear from him.

Mr. McKevitt: It is in Mr. Littell's affidavit, I
906 believe.

The Court: That is right, in his affidavit, that is where I got it.

Then I think I read somewhere in the record here or the joint appendix, that Mr. Littell has not made any money, is that correct, as Claims Attorney?

Mr. Wiener: Yes, and he so testified here. He has not received a dime in 17½ years.

The Court: That is what I wanted to be enlightened on. Is there any evidence that the Plaintiff in this case received any money as the result of being Claims Attorney?

Mr. Pittle: You may recall the testimony of Mr. Littell, on my examination of him, that he has not received any fee for any claims as yet, but he has been reimbursed or had charge of spending over \$700,000 in the prosecution of the claims.

So he is not exactly out of pocket.

Mr. Wiener: I didn't say he was.

Mr. Pittle: The inference again is there that he has not received a penny in his affidavit. This is true, he has not received any.

The Court: What I am trying to find out, and this may be material and it may not be material, whether he personally has profited from being what is known as a Claims Attorney.

907 Mr. Pittle: He has not submitted any vouchers for collection of fees as claims, as I understand it. Is that right?

Mr. Wiener: He is not out of pocket, but he has not been in pocket for claims in the 17 years by as much as a thin red dime.

The Court: Well, I mean, potentially, will he get any money in the future?

Mr. Pittle: He will be able to submit vouchers for any case he feels he has successfully prosecuted as a Claims Attorney, and at that time the question of his reimbursement will come up, for the 10 per cent, or whatever it is.

The Court: I think that clears the matter up.

Let us proceed.

Mr. Wiener: Has Your Honor finished with the exhibits?

The Court: Yes. I have found it. I have a copy here.

Mr. Wiener: That is my copy of Defendant's Exhibit 1, which I will need for my examination, Your Honor.

Now, may I refer Your Honor to temporary page 54 in Mr. DeRose's testimony about the resolution?

It states: Mr. Leo Denetsone and his wife came to the lodge with the rough draft, and I dressed it up for them.

Mr. McKevitt: Thank you, and I am glad you read it, because that was my point, that I thought that was the
908 testimony.

The Court: Well, you have a good memory.

By Mr. Wiener:

Q. I show you, Mr. Littell, Defendant's Exhibit 1, a resolution of the Advisory Committee of the Navajo Tribe, passed June 25th, 1963, requesting your termination, and Defendant's Exhibit 21 for identification, a telegram from Mr. Nakai to the Secretary of the Interior of the same date, summarizing that resolution, and I ask you whether either of those documents or their substance were discussed with the Secretary when you conferred with him on June 25th and 26th? A. Yes.

Q. And will you state the substance of what was said on both sides concerning the subject matter of those two documents?

The Court: Excuse me, I had made a note here that the conference was held on June 26th and 27th.

The Witness: I was just going to correct counsel, Your Honor. This is correct. The 25th, as I recall, that was the day that Oren Beatty called me to come over.

By Mr. Wiener:

Q. All right, so that you have a conference on the 26th and the 27th of June.

What was the substance? Well, how long did the
909 conference last? A. Forty-five minutes.

Q. What was the substance of what you said and what he said concerning the subject matter of the resolution and the telegram? A. I was aware of the telegram only by press accounts and he initiated the conversation by saying that things were getting pretty rough on the Navajo Reservation, and we had to do something about it,

and from there we went on into a discussion of the whole picture on the Navajo Reservation, of which two main items, in an attempt to simplify the answer to your prior question, two main items were the passing of the housing ordinance, and how it was done by manipulation, and a measure of trickery, and the—

Mr. McKevitt: I am sorry, Your Honor, but it is not clear to me who is saying this.

The Court: Do you remember who was saying what, or who said what?

The Witness: I said this to the Secretary, and the second item along in this same front is this document that you have just put in of May 31st, employing these men as consultants, Barry DeRose and the Schifter firm.

Now, if it is within the scope of your question, and I understood it is, you wanted me to state—

By Mr. Wiener:

Q. What was said, what was the substance of your position and what was the substance of the defendant's position. A. I said that the function of the housing ordinance, and the function, or the true function of this May 31st—well, let us take them one at a time.

That the true function of the housing ordinance was not to get low-cost housing at great speed, but to get Barry DeRose and the Schifter firm employed at great speed, because I, myself, had confirmed that we were not in a hurry, and that there was time to agree upon a proper clause, which would not risk the waiver of sovereign immunity, and that I had privately discussed it with counsel for the Government, as to the change of the terms, and as a matter of fact, we could have reached an amicable agreement within a week, but there was no week allowed, and the ordinance was adopted on the 14th.

I explained this to the Secretary.

Q. What did the Secretary say on that subject? A. He listened with interest, and after I finished the second sub-

ject, he said: Perhaps this conference is late; I should have seen you before this.

And I said: Yes, I think you should, Mr. Secretary; I requested a conference several weeks ago.

Q. And, this was all on the 26th of June? A. The 26th, yes, sir.

Q. Was anything further said about that subject on the 27th of June, and before we get to the 27, was this
911 again just the two of you? A. Just the two of us.

Q. How long did the June 27th conference last? A. Well, that was much shorter, and of course, I haven't finished with June 26th.

Q. Well, continue with June 26th, what was said by you and what was said by the Secretary, first, on the matter of the housing resolution and the employment of Mr. DeRose and the Schifter firm as consultants? A. Well, this led on into a discussion of the June 25th telegram, and it was related, you see, to the two things.

Q. Have you at this point told us everything that was said concerning the housing resolution on the 26th of June? A. Substantially.

Q. Very well. Now, will you go to the other subject that was discussed, the June 25th resolution and the telegram? A. I said that this was one of the most strained efforts to put attorneys on an Indian pay roll that I had ever seen, because ordinarily the Bureau of Indian Affairs and the Department of the Interior protects tribal attorneys against invasions of this sort, that I, myself, had drafted a resolution of 1956, authorizing the Chairman and the Advisory Committee of the Tribal Council to employ consultants, and that this was intended for short term employment, like wildlife specialists, or fire protection, in case of
912 an emergency to get quick consultant advice, to protect the Navajo timber, or pest control.

It was limited to 90 days or a thousand dollars a month for each of these events, and I said with the existing regulations of an exhaustive character in Title 25, Sec-

tion S1 and S2, as you know, and the Secretary well knows as a lawyer, pertaining to the employment of lawyers, that this was a subterfuge and an evasion to try to put these men on as protectors of natural resources and advisers.

Q. And what did the Secretary say to that? A. It was after that discussion that he said, that he assured me at least three times during this conference, that Schifter would not be employed, and for this and other reasons.

Q. Was anything further said about the June 25th resolution of the Advisory Committee or the June 25th telegram from Mr. Nakai? A. Yes, sir.

Q. What? A. For the first time I saw it in that he—

Q. When you mean it, do you mean the telegram? A. I had not seen it.

Q. What do you mean by "it," Mr. Littell? A. Excuse me. I do mean the telegram, and Secretary Udall sent for Miss Light, his secretary, and said, Please photograph a copy of this telegram for Mr. Littell, and as I left the office, I was given a copy of the telegram, which I had never seen, and this is the document that you handed to me here.

Q. Now, did you and the Secretary discuss that telegram at your June 26th conference? A. Yes, we did, to the extent that his main objective, he said, that he didn't want to have any more telegrams like this, and destruction in the Council among the Navajos, and he thought he should call a conference between the two opposing factions, and what did I think of it.

I said I thought it was a very good idea, and he had set in his mind I am quite sure at that time, although it may have jelled a few days later—

Mr. McKevitt: I object to this as an opinion, Your Honor.

By Mr. Wiener:

Q. Only what the Secretary said on the 26th. A. Well, I cannot be absolutely sure it was set July 1st, but the ul-

timate result was he set July 1st for the Roswell conference between the two factions, and he asked me who should attend.

Q. Was this on the 26th of June? A. Yes, sir.

Q. All right, go ahead. A. And he asked me who I thought should attend from the faction that opposed Mr.
914 Nakai, and I went over the names that I thought would meet his specifications and I also raised the question about whether the General Counsel should attend, and he said, No, he thought no lawyers, and I thought later this was better.

We discussed McCabe, who was next to Norman Littell, a very controversial figure with Nakai, and I said: You must have him present, he is the Coordinator of Information, and I think it would be quite remiss if you heeled into Nakai opposition and did not include McCabe in the delegation.

So the delegation was formed.

Q. Now, this concludes the June 26th conference? A. Substantially, yes.

Q. Now, we move on to the June 27th conference.

Was anything further said about the committee of opposition or the telegram or the resolution? A. Well, I should say, as we walked to the door on the 26th, if I may supplement it, we talked about how to effectuate it.

I said: Mr. Secretary, you now have a legal problem. You have a housing ordinance adopted, and immediately they adopted it, they employed Barry DeRose and Schifter, and I said: How would you, how would it be to have a man on the reservation constantly undermining, undermining.

He said impatiently, he said: I settled that, Nor-
915 man. He said: Schifter's firm is not going to be there, which implicitly carried with it DeRose, they are in the same contract.

Mr. McKevitt: I ask the last answer be stricken, Your Honor.

Mr. Wiener: I have no objection to the last part.

Mr. McKevitt: To include DeRose, is his conclusion.
The Court: All right, it will be stricken.

By Mr. Wiener:

Q. Now we get to the 27th of June. A. I was so—well, I only want to say, that I read the telegram the next morning at 5:00 o'clock in the morning. I was simply too tired the night of the 26th, with press inquiries and so forth that I had to avoid, because I could not remember all these things.

So the next morning I read it, and I was so shocked and dumbfounded that I called the Secretary's office and said I was coming, and I hoped to get him before his press conference.

The Court: Excuse me, so I can follow you, what telegram are you talking about?

The Witness: June 25th, the main charge and indictment.

Mr. Wiener: Defendant's Exhibit 21 for identification, Your Honor.

916 The Court: All right.

The Witness: The Secretary was holding a press conference at 9:30, and I was at his office at 9:00 o'clock and asked to see him on the matter of discussion yesterday.

By Mr. Wiener:

Q. And this was the conference that you said lasted about 10 or 15 minutes? A. This lasted at least 15 minutes, yes.

Q. Now, what was said by you and what was said by him? A. Well, in substance, I said I was shocked beyond words at this telegram, and I wanted him to say in his press conference, since my name had been smeared from coast to coast by this release to the press, without any hearing from me, with me present, that I wanted him to say in his press conference what he had said in the conference of June 26th, which I didn't quote to you because

you didn't ask me about it, but one of the remarks was: Oh, Norman, nobody can hurt your reputation, everybody knows what your reputation is, and he also indicated that they would have to investigate and these things would be made public—well, maybe I am getting beyond your question.

But he said in that remark, to which I replied by the famous story of the Duke of Wellington, and he agreed that my answer would be the same.

I said my answer would be, Publish and be damned, and he said: That is the answer I would expect from you,
917 Norman.

Now I said on the morning of the 27th: Mr. Secretary, you were kind enough to say that nobody could affect my reputation, it was such that it could not be hurt, and I said: It has been hurt by this terrible telegram going all over the press and the West, where I have thousands of friends.

Q. All right. A. I want you to say in the press conference, in all fairness to what you said to me yesterday in private, and he said: No, Norman, I can't do that, because I don't want to take sides, I want to operate between the two factions.

And then I said, At least tell them what you told me, that you would terminate Schifter, because my plans—

Mr. McKevitt: I object. There is no testimony that he would terminate him.

The Court: Well, he may relate what he said.

Mr. Wiener: He did so testify.

The Court: Well, the record speaks for itself.

The Witness: I said: At least tell them that. If you want to have a successful conference at Roswell, and you want to offer something to the Nakai opposition, for Heaven's sakes be forthright enough to tell them what you told me, that you are not going to have the Schifter firm on the reservation, or for reasons of your own, aside from any that I have stated.

By Mr. Wiener:

918 Q. What did the Secretary say to that? A. He said: No, I can't do this. I want to occupy a neutral position, when I meet with them on July 1st.

Q. Was anything further said at that July 27th conference? A. Oh, a great deal was said, but I wasn't present in July—oh, excuse me, at July 27th?

Q. On the 27th conference with you. A. Yes, indeed. I pointed out some actions of the Commissioner, Commissioner Nash, in relation to Larry Davis, and he cut me off short and said: Don't attack my Commissioner, and again he said, as he said several times in the preceding day: Don't attack my friend Barry DeRose, we are close friends, and I have confidence in him, and I have known him longer than I have known you, and I have confidence in him.

So he cut off that subject, but I then said: You have left standing these two resolutions of employment, the housing ordinance and this consultants deal that you have just spoken about, approved May 31st, and the contract signed June 14th.

Well, he said, My lawyers will have to go into that detail, Norman; I can't handle all those things.

But he said: I suggest that you see Frank Barry, the Solicitor.

Q. Did you then see Frank Barry? A. I went immediately to the office of Frank Barry, who was tied up
919 all day until 4:00 o'clock, and he said: Also have Ed Hayden there because he will have to follow through on this.

And I saw him at 4:00 o'clock.

Q. Without going into the conference with the Solicitor at this time, and we will adduce that later when its relevance more fully appears, but I call your attention to Exhibit A, page 252, and following, pages 252 to 254 of Plaintiff's Exhibit A, and ask you whether this Exhibit A represents the other version of your conference with Mr. Barry at which Mr. Hayden was present?

Mr. McKevitt: I didn't hear the question.

Mr. Wiener: The question was: Does this represent the other version of the conference?

The Witness: It does, it represents—yes, the answer is yes.

Mr. Wiener: If Your Honor please, and for the information of the other side, I will go into that later but not at this time.

The Court: All right.

By Mr. Wiener:

Q. Now, in the course of your conversations with the Secretary on the 26th and 27th of June, did he say to you that during the preceding week, on the 19th or 20th or 21st of June, he had met with Messrs. DeRose, Schifter, 920 Nakai, Denetsone, Todacheene, and Luther? A. No, sir, never heard of it.

Q. When did you first learn that on the 19th, 20th and 21st of June there was this conference with the Secretary to which Messrs. Nakai, Denetsone, Todacheene, DeRose, and Mrs. Denetsone have testified to? A. I read of that in that press release, which is in evidence. I am sorry I don't have that exhibit number, of June 21st, but the Secretary never mentioned it, that is what I meant to say.

Q. Very well. Now, did you see the Secretary again between the 27th of June and the time of the Roswell conference? A. No.

Q. Were you present at the Roswell conference? A. No.

Q. Did you see the Secretary between the time of the Roswell conference and the 11th of October? A. No. On the 11th I saw him.

Q. Yes. Now, who was present at that October 11th conference with the Secretary? A. Nobody but the two of us.

Q. And how long did that conference take? A. I don't remember precisely, but it was quite a while, at least a half an hour—no, it was about an hour, that was a long one, yes, that was a long conference.

921 May I correct that? From 11:45 to—it was quite a long conference. I checked a note here, it was 11:45 to 12:55 p.m.

Mr. Wiener: If Your Honor please, since this is a different subject, and it may take some time, I wonder if this would be a good time to take the recess?

The Court: Yes, we will take a 15-minute recess at this time.

(Thereupon, a short recess was had.)

By Mr. Wiener:

Q. Mr. Littell, during the recess were you able to find a copy of the telegram concerning the Housing Authority resolution that you sent to Mr. Nakai? A. Yes, sir, here are three copies.

Mr. Wiener: I offer the paper which the witness just handed me which is a copy of a telegram from him to Mr. Nakai, dated June 14th, as Defendant's Exhibit AE in evidence.

(The document was marked Plaintiff's Exhibit AE for identification.)

Mr. Wiener: I offer it in evidence. I am offering it in evidence as Plaintiff's AE.

Mr. McKevitt: Again, the objection we have to this is that it is irrelevant, it is not in the issues.

The Court: Overruled.

922 (The document previously marked for identification as Plaintiff's Exhibit AE was received in evidence.)

By Mr. Wiener:

Q. There has been reference, Mr. Littell, to the opposition. Will you explain that term? A. Well, the origin was really in the circumstances I related to you about the conference in the Secretary's office on June 26th and 27th, as to which, as to who should represent the so-called Nakai

opposition, namely, members of the Navajo Tribal Council, at the Roswell meeting, and the term stuck as the opposition committee, it sort of carried on.

Q. Were all the members of the opposition members of the Navajo Tribal Council? A. Yes, except Maurice McCabe, who was Executive Secretary appointed by the Tribal Council as Executive Secretary of the Tribe.

Q. Was there provision in the Navajo Tribal Code for your advising individual Council men as well as advising the collective Navajo Tribal Council? A. Yes.

Q. And was there provision in the Navajo Tribal Code for making you as General Counsel the head of the Legal Department? A. Oh, yes.

Mr. McKevitt: Your Honor, this calls for a legal conclusion.

The Court: Isn't this a matter of record?

923 Mr. Wiener: Certainly, and we are not before a jury.

By Mr. Wiener:

Q. You heard the testimony last week of Mrs. Jenny Denetsone? A. Yes.

Q. Was she an employee of the Legal Department? A. Yes.

Q. Was she subject to your direction? A. Yes, in the over-all sense. Of course, she was in Window Rock and I was in Washington, but she was a secretary to the legal staff.

Q. Did you ever give her permission to remove papers from the files of the Legal Department at Window Rock and take them to her home? A. No, sir, never.

Mr. McKevitt: I object to that, Your Honor, because there is no foundation to show she needed permission.

The Court: Well, I will admit it.

By Mr. Wiener:

Q. Was there any provision in the Navajo Tribal Code, or any regulations promulgated thereunder, giving em-

ployees, clerical employees of the Legal Department the right to take documents pertaining to the work of that department to their homes? A. Certainly not.

924 Mr. McKevitt: Your Honor, I am going to object to this whole line of testimony because I think we are getting off on a tangent.

The Court: I don't know, but I remember counsel objecting on the ground that this was an illegal seizure of papers. Is that your point?

Mr. Wiener: Well, that is part of it, yes.

The Court: Is this to supplement the record on that in case you might raise this on appeal?

Mr. Wiener: Yes, sir.

Mr. McKevitt: Well, this is a matter of argument.

The Court: Well, is there any authority for employees to take these papers that belong to the Tribal Council home?

Mr. McKevitt: Mr. Nakai authorized them to take them. Mr. Nakai is the Chairman.

The Court: Did he say that on the stand?

Mr. Wiener: I don't remember any such testimony.

The Court: I don't recall that, whether he did or not. I don't think it is going to do any harm.

The Witness: May I ask a question? Did your question extend to before the Nakai inauguration or after?

By Mr. Wiener:

Q. Did you give permission to Mrs. Denetsone prior to the inauguration of Mr. Nakai to take to her home papers belonging and pertaining to the work of the Legal

925 Department of the Navajo Tribe? A. No, sir.

Q. Did you give such permission afterwards? A. No, sir.

Q. When did you first learn that she had been taking papers from the files of the Legal Department behind your back to her home? A. I first learned it conclusively, when she stated it on the stand, that all this was before and after

the Nakai inauguration, but we had rumors to this effect for quite some time.

Q. What if any was Mrs. Denetsone's connection with Mr. Laurence Davis who appears in these documents as having been an Assistant General Counsel of the Navajo Tribe? A. She was his secretary in the Legal Department up to the time when she left the legal staff at Window Rock and was retained for some further time until May 9th, 1960, after the approval of the contract of August 8, 1957.

Therefore, she was not his secretary at Phoenix, but she was for a very considerable time at Window Rock before he went to Phoenix.

Q. Is Mr. Laurence Davis now connected with the Navajo Tribe of Indians? A. No, sir.

Q. When did he terminate his connection and under what circumstances? A. The Advisory Committee has authorized by provision in his particular amendment to the contract, terminated—and put in at his request, incidentally—terminated his employment on 60 days' notice on May 9, 1960.

Q. Did you have anything to do with that termination? A. Only that I was, of course, consulted and was fully aware of the various circumstances which led to his termination.

Q. Did he in connection with that termination ever bring legal proceedings against you? A. Yes, sir. He sued me for a million, two hundred thousand dollars in a libel suit, claiming that my explanation of this matter in executive session of the Navajo Tribal Council was libelous.

Q. Now, let us move to your October 11th meeting with the Secretary, and that, Your Honor, is October 11th, 1963.

You have told us it lasted a considerable time and that you and the Secretary were the only ones present. Will you state as clearly as you remember, and as succinctly as possible while still giving the true import of what was said, and tell us what he said and what you said? A. When I arrived his personal secretary—

The Court: Do you have any memorandum regarding the substance of what was said by either party?

The Witness: Yes, sir.

The Court: At that meeting?

927 The Witness: Yes, sir.

Mr. Wiener: Do you want me to put it in?

The Court: Well, I don't think you can put in a verbatim copy, but if you want to refer to it, I don't see any reason why you cannot.

Mr. Wiener: You may refresh your recollection, Mr. Littell.

The Court: When was this dictated after the conference?

The Witness: Immediately after the conference, that very evening at home.

The Court: All right, you may proceed.

By Mr. Wiener:

Q. Will you answer my previous question, refreshing your recollection to the extent that you find it necessary?

A. I was asked to come to the Secretary's office, and the hour was set by Mrs. Light for 11:45 a.m. on Friday, October 11th, and when I arrived in the waiting room, Mrs. Light handed me a copy of the Solicitor's memorandum to the Secretary, which appears as Exhibit 8A in the joint appendix at page 209, and said that the Secretary had asked that I read this while waiting for his appointments ahead of me to clear, and to come in at any time I was sent for, whether I had finished it or not.

928 I had just reached the last page of it when she came back and said the Secretary was ready, and I went into his room.

I was, of course, very much shocked by the contents of this memorandum.

The Court: That may go out. That is his conclusion.

You may state what was said.

The Witness: Very well.

Inasmuch as we were alone, and the matter was of a serious character, I asked if I could take notes, and I had

a notebook in my hand, and he said he would prefer I do not.

So I laid the notebook down, together with the Solicitor's opinion, on the chair in front of me, and we then discussed the situation on the reservation.

He asked me what the situation was now on the reservation and I said: I presume the Commissioner of Indian Affairs has kept you advised, Mr. Secretary.

And he said: I am sure that he would have done so had there been anything of importance that I should know.

I said: Are you of the impression that there is no other issue on the Navajo Reservation, except this attorney issue, as to the internal affairs of the Navajo Tribe?

And he said: Yes, he thought that was the main thing, as far as he knew, that was it. He said that a couple of times, that that was the main issue. In spit of our talks of the 27th.

929 He had, of course, been away in Africa, as you may recall, in September.

I then said: But you surely are aware, Mr. Secretary, that none of the suggestions that you and Senator Anderson made at the Roswell conference between the two groups, the Nakai opposition and the Nakai group, were carried out, with one possible exception, that the transcripts of record of the Council and Advisory Committee, in so far as they are made, are now circulated apparently, although belatedly, they are circulated as they were before. This had been dropped, and this was one of the points of the Nakai conference, the Roswell conference, I mean.

And he said, No, he didn't know, apparently, didn't know what followed that Roswell conference.

Mr. McKevitt: May I ask that be stricken about the Roswell conference, because this witness wasn't at the Roswell conference.

Mr. Wiener: I understand that this is a conversation.

The Court: All that he has been asked about is the conversation that he had, what he said and what the Secretary said.

By Mr. Wiener:

Q. Were these matters in connection with the Roswell conference, Mr. Littell, whether or not you were there, part of your conversation with the Secretary on October 930 11th? A. Oh, yes, that is one reason I mention it.

He said: But you are not getting on well, or words to this effect with the Bureau of Indian Affairs, with the Commissioner, and I said: I always got along with him until I found that he was backing his old friend Schifter to get him in the Navajo picture.

The Court: You said who was backing Schifter?

The Witness: Fileo Nash, the Commissioner of Indian Affairs.

And the main part of this conversation, however, pertained to his reference on several occasions to the fact that he had a letter on his desk, that he did not wish to mail. This is the letter to transmit this opinion of Solicitor Barry, which had been shown to me previously in the outer office.

I don't want to send that, Norman, he said. I want to find a constructive solution.

And after he had used a phrase like that, constructive solution, two or three times, I said—I can't get these things in sequence, perhaps, but I said: Let me get it quite clear, Mr. Secretary, do I correctly construe your idea of a constructive solution in this conference, that I as General Counsel for the Navajos for 16 years should now resign as General Counsel and keep claims?

931 He had already said that this was what they agreed on in Roswell, that I should resign as General Counsel and keep claims.

And I had replied, and I reminded him of what I told Senator Anderson, if you agree to agree without me present, because the important party is the other end of the contract—

Mr. McKevitt: This is not a conference with the Secretary and what Secretary Udall said, but he is now talking about Senator Anderson.

The Witness: It is a conversation with the Secretary because I referred to my conversation with Senator Anderson.

The Court: Do I understand this is what you said to the Secretary and what he said to you?

The Witness: This is correct, Your Honor.

The Court: That is all we are concerned with.

Mr. Wiener: This is all we are inquiring about.

The Witness: This is entirely correct, and I said, I have said as I told Senator Anderson, too, that I am not interested in resigning as General Counsel and keeping claims, but if I resign from one I resign from both.

And repeating my statement, I said: Mr. Secretary, you have said two or three times that you hoped to find a constructive solution.

Is that your conception of a constructive solution, that I should resign as General Counsel and keep claims?

932 He said: That is, that is it, and he said: I never intended that you should resign from claims.

He said: We all agree at Roswell this would be the solution. That's why I made this statement about Senator Anderson who attended the Roswell meeting, and my conference with Anderson.

And he sought to persuade me, he said: Many lawyers have earned substantial fees from claims, and he sought to persuade me toward this course, and I then explained to him that great damage had been done to the Navajo claims by the Commissioner of Indian Affairs and by the Advocacy of Schifter, in a collateral respect, in that I had retained and paid Marvin J. Sonosky, an outstanding Indian attorney, who was formerly with the Department of Justice, to assist me on claims, and had paid him some nine or ten thousand dollars to assist in this work, but he was now in the firm of Strasser, Spiegelburg, Fried, Frank & Kampelman, although of counsel—no, a partner, and that it was impossible for me to carry him forward when there are conflicts between his firm and mine, and this was fully

known to the Commissioner when he encouraged the employment of Schifter on the reservation, and that I had been compelled to release Mr. Sonosky from a burden of work in which he had years of accumulated service, because of this basic conflict of interest, which grew too complicated to tolerate.

933 I had explained that to him, and I said: Furthermore, I have combed the highways and the byways to find competent counsel to assist, and you cannot find experienced claims attorneys to contract, and no Indian claims attorney would take one of these cases, as they are back breaking, and they last for years, and this has lasted for years in my case, and he was fully cognizant of this.

And I said: Furthermore, this schedule is now set for findings, and in this map which I showed you the other day, I mentioned the conflict of the surrounding Indian Tribes, and I said: Findings in every one of those cases are now set and due, and I believe the next one was—well, it doesn't matter. The next one was, I believe, October the 18th, and then November, and the Commissioner ordered no further extensions of time.

And I said: There is this tremendous burden of work with the assistance of only Mr. Graham, who was relatively new, very helpful but relatively new in the problems, and Mr. McPherson had resigned for reasons of health.

So he understood the claims position, and this led to a discussion of the question of Healing against Jones, and compensation, and so forth which was one of the questions raised in the Solicitor's opinion.

And I said that I thought that—well, for sure I would not give him any answer immediately, and I think he
934 should give me a copy of the opinion of the Solicitor, and he said: I will give it to you when I mail the letter to Nakai.

But that, Mr. Secretary, I said, is too late. You have then made public the official position of the Department and denouncing me for these things.

I said: I can see in this opinion in ten minutes' reading, at least one very important resolution that is omitted entirely, and I know that there are more, and I know that there are Council minutes to which the Solicitor didn't refer, and I think I should, after 16 years of service as General Counsel and as Claims Attorney, in the course of which I have not received one cent of compensation for claims work, I think you should give me this opinion and let me tell you what is wrong with it.

Two or three times he declined and was obviously reluctant to do that. It was now or never.

So he was mailing it to Mr. Nakai, and he said: I will mail you a copy when I mail it to him.

And I said: Then, Mr. Secretary, the least you can do is to let me sit down here and take notes, if you don't want me to have a copy, so that I can see what is wrong with the opinion, and there are plenty of things wrong with it.

I said: I know that your boys had a hard time briefing the Council minutes, they are hard to handle, and they are not thoroughly indexed, and I said: Your position,
 935 Mr. Secretary, will be a very weak one, and this is what turned the argument to success, because I said: Mr. Secretary, your position will be an exceedingly weak one, if you hand me this opinion of such a devastating character, for terminating me after 16 years of service with the Navajo Tribe, and I must tell you now whether I resign, before you make it public by mailing it to Mr. Nakai.

And that is when he said: I will let you have a copy.

And this was Friday, and I said: May I take it now?

And he said, No, I will write you a covering letter to protect my position in it, and you can pick it up later in the afternoon, and I had my secretary come over and get it later that afternoon.

But we also discussed the subject of lawyers. I said, Of course, I had thought of resignation.

Who did he have in mind? Well, he said, Senator Anderson had a panel of five lawyers in New Mexico who would be acceptable to him.

And do you, Mr. Secretary, have your panel that are lawyers that would be acceptable to you?

And he said: No, they would have to be selected by the Navajos.

Of course, he avoided that question, the direct answer to that question.

936 Mr. McKevitt: I object to that, Your Honor.

The Court: All right, that will go out, as a conclusion.

The Witness: In any event, he said, we were all of the opinion that there should be New Mexico and Arizona lawyers to handle Navajo business. That was unequivocally stated.

By Mr. Wiener:

Q. Is that substantially the end of the conference? A. That is substantially the end.

Q. May I have the documents which you have been using to refresh your recollection? A. Yes, sir.

Q. Did you omit anything? A. There are details omitted, of course, but the essence of the matter is there, yes.

Mr. Wiener: I will ask that this document that the witness just handed me be marked Plaintiff's AF for identification.

(The document was marked Plaintiff's Exhibit AF for identification.)

The Court: Is there any objection?

Mr. Wiener: This is only for identification, Your Honor. I am not offering it in evidence.

By Mr. Wiener:

937 Q. Now, will you turn to page 208 of the joint appendix, Plaintiff's Exhibit A, and I will ask you whether that Exhibit 8 is the letter whereby the Secretary

transmitted the memorandum of the Solicitor concerning which you have been testifyiny? A. It is.

Q. And then I will ask you to look at Exhibit 8 beginning from pages 217 to 218, and ask you whether that is the letter you sent after you had an opportunity to examine the Solicitor's opinion? A. It is

Q. And then I will ask you to look at pages 256 to 261, which is part of the attachment, and whether that is the letter you sent on or about the date stated, October 22nd? A. It is.

Q. I will ask you to look at page 261, Exhibit D and ask you whether that is the letter you sent on the date indicated, together with part of the memorandum written by Mrs. Wauneka, which concludes on page 273? A. Yes, I that there were six pages of that memorandum, if I remember.

938 Q. Now, between October 11 and November 1, did you have any conferences with the Secretary? A. No, sir. This was the last.

Q. Did you have any conferences with Mr. Barry? A. No, sir.

By The Court:

Q. Excuse me, Mr. Littell. Before you leave this part.

I think I read this yesterday. Now, refer to page 261 of the joint appendix, the letter that you sent to the Secretary of the Interior October 23d, 1963. At the end of the first paragraph, it says this, and I won't read the whole sentence: As you stated to me, it seemed, in all fairness, that I should send you the enclosed excerpt of conversations—one of many—between Barry DeRose and Annie Wauneka, as well as others from time to time.

Then as an enclosure, I think you start out as follows on page 262: Howard Gorman said to Raymond Nakai and his group, "You get this resolution to the Council."

Now, is this Mrs. Wauneka speaking in this enclosure? I was reading that yesterday and I was wondering who was doing the talking there.

A. Well, yes, it is Mrs. Wauneka, and I am not surprised, it is a little confused, but this is six pages listed from a longer memorandum of Mrs. Wauneka to advise the Secretary as to what Barry DeRose was doing on the reservation.

939 Q. Is this something that she told you that she had learned as a result of her talk with Mr. DeRose? Is that what you were trying to say? A. Yes, sir, and I believe you will hear more of that when she is on the stand.

The Court: Well, it was a little confusing to me yesterday, It is a little ambiguous.

Mr. Wiener: I might say this, Your Honor, that Plaintiff's Exhibit X for identification, which has not yet been offered, is the complex memorandum by Mr. Wauneka, of which the printed portion is a part and concerning which I also examined Mr. DeRose.

The Court: All right, let us proceed.

By Mr. Wiener:

Q. Now, Mr. Littell, turn to page 220 of Plaintiff's Exhibit A, a letter from Mr. Udall to you, dated November 1 and I will ask you how that document reached you and the exact time it reached you? A. The next morning, by I believe the 11 o'clock mail in my office. I don't believe it reached me in the first mail; some time later in the morning.

Q. Was it sent by special messenger or in the mail? A. No, sir, by mail.

Q. I show you Defendant's Exhibit No. 1, which is the resolution of the Advisory Committee of the Navajo
940 Tribe of Indians, dated June 25, 1963, and ask you whether between the date of that resolution and the first of November of 1963, the Secretary or any of his subordinates called on you formally to reply to the allegations made in that resolution? A. No, sir.

Q. Taking now another period, between the 14th of June, 1963, which is the date of your Housing Authority

telegram to Mr. Nakai and the first of November, 1963, did Mr. Nakai ever personally call on you to explain the matters discussed in that Advisory Council resolution? A. No, sir.

Q. Did Mr. Barry DeRose, who testified here last week, ever come to you in connection with the matters set forth in that resolution? A. No, sir.

Q. Did Mr. Richard Schifter, who according to Mr. DeRose's testimony accompanied him and his delegation on the 19th of June, 1963, on their visit to Washington, ever ask you for an explanation of the matters set forth in that resolution, Defendant's Exhibit 1? A. No, sir.

Mr. McKevitt: I object to these questions, Your Honor. I see no relevancy why Mr. Schifter or Mr. DeRose or anybody else should be asked.

The Court: As I understand the purpose, and let
941 me see if I am correct, and if I am not, somebody correct me, but the purpose of the question as I get it is that you want to find out from him, from the witness, whether between June 25th, 1963, which is the date of the resolution promulgated or adopted by the Advisory Committee, between that date and November 1st, 1963, when he was formally notified by the Secretary of the Interior that his contract had been suspended or would be within a month of then, whether or not during that period he had ever been formally notified by any of the parties that you mentioned regarding these charges, and whether he was called upon to answer these charges.

Is that the purpose of the question?

Mr. Wiener: Yes, sir, Your Honor.

Mr. McKevitt: Your Honor, my point is that the question as far as the Secretary is proper, and perhaps as far as Mr. Nakai, but if we go into everybody else, and I don't see any reason or any foundation, why Mr. Schifter should ever notify him, or ask for an explanation, or Mr. DeRose should ask him anything, or why Pete Smith should ask him about it, and we can go on all day this way.

Mr. Wiener: Your Honor, I am not asking about Pete Smith. I am only asking about the persons who accompanied Mr. Nakai and Mr. DeRose to the Secretary on the 19th of June complaining about the machinations and shortcomings of Mr. Littell.

942 The Court: All right, I will overrule the objection you may answer.

The Witness: No, sir.

By Mr. Wiener:

Q. Were you ever invited by the Advisory Committee of the Navajo Tribal Council as it was then constituted to explain to them the matters that they put into their resolution of July 25th? A. Never.

Q. And were you ever called by the Navajo Tribal Council, the governing body of the Navajo Tribe of Indians, to explain your position concerning the matters set forth in Defendant's Exhibit 1, the resolution of the Advisory Committee? A. No.

Q. Now, let us take up specific amendments, and I will ask you to turn to page 40 of the joint appendix, Plaintiff's Exhibit A, and in particular to the second full paragraph on that page which contains the proviso that there shall be no change in your compensation for the first five years of the contract.

This is page 40, Your Honor, the second full paragraph.

The Court: Is this the contract of 1957?

Mr. Wiener: Yes, Your Honor.

By Mr. Wiener:

943 Q. Do you have that before you, Mr. Littell? A.

The second full paragraph doesn't come out that way. Let me see.

Q. The second full paragraph. A. Yes, I have it.

Q. Now, my question is: Prior to the approval of the 1957 contract, of which this was a part, did you have any discussions concerning that paragraph with anyone in the Department of the Interior? A. Not that I can ever recall.

Q. Did you discuss it with Mr. Greenwood who ultimately approved the contract A. I really can't recall that the subject ever came up.

Q. Well, then, let us turn to Amendment No. 9, which starts at page 90, and with the signatures extends to page 94. This, as page 90 shows, this agreement is dated August the 14th, 1961.

Where were you at that time? A. In Turkey.

Q. What were you doing in Turkey? A. I took my vacation period to fulfill a mission for the United States State Department in helping to revise the foreign investment encouragement laws of Turkey.

Q. Who, if anyone, represented you before the 944 Tribal Council when this amendment and the authorizing resolution were under discussion?

Mr. McKevitt: I object to this as calling for a conclusion.

The Court: Well, does he know?

By Mr. Wiener:

Q. Do you know? A. Well, Assistant General Counsel McPherson acted in my absence. I am not quite sure I know your meaning, by represented me, because much of this went on without my knowledge of the details at all.

Mr. McKevitt: I object also to the form of the question because there was no discussion of the amendment.

Mr. Wiener: I think the minutes will speak for themselves.

The Court: All right. I will admit it. Let us proceed.

By Mr. Wiener:

Q. Now, after the amendment was signed by the parties— A. Counsel, I must correct my testimony. It is early Monday morning and I am tired, I guess, but Bart Greenwood and I didn't have a discussion on this, on this clause you asked me about.

Q. I will refer to that in a minute, after I finish with nine.

945 Now, this Amendment No. 9, after it was signed by the parties, the several parties thereto, was forwarded to the Department, was it not, in accordance with the statute? A. Yes, sir.

Q. And was it there disapproved by the Secretary on the ground that by increasing your compensation to \$35,000, after less than five years had elapsed, you were overreaching your client, the Navajo Tribe of Indians? A. No.

Mr. McKevitt: I object to that question, Your Honor. It is purely argument.

The Court: I was going to say the same thing. I think it is argumentative. You may argue that.

What is the date of that amendment?

Mr. Wiener: The date of the amendment is—the date of the contract is 14 August, 1961, and it begins on page 90, and it was approved by Mr. Udall personally on December 22, 1961, and that is on page 94.

The Court: What is the date it was approved?

Mr. Wiener: December 22d, 1961.

By Mr. Wiener:

Q. Now, let us go back to page 40, Mr. Littell, and the conversation, if any, with Mr. Barton Greenwood. A. We discussed this among other matters, and the question of this increase in salary on my part, being in the
946 fifth year, and not after five years. In other words, we were a little short of the five-year term, I hadn't figured the number of months.

And Greenwood said that this was immaterial, that no counsel could bind another counsel, that any parties to any agreement could agree to amend it, and this was obviously what they had done.

Q. Now, let us go to Amendment No. 11, which begins on page 100, I believe. Yes, Amendment No. 11 begins on page 100 and this is an amendment, is it not, that was approved by the Secretary of the Interior? A. Yes.

Q. This is an amendment that was reviewed by Solicitor Barry? A. Yes.

Q. Do you know who drafted that amendment? A. I am not real sure. By this time, the pressure of work was such that probably Walter Wolf drafted it, and put it in the original draft shape, but it might have been Mr. Graham. I might have asked Mr. Graham to work this out from the other models of amendments, and I just cannot remember who drafted it.

Of course, it eventually came to me.

Mr. Wiener: Will you mark this document for identification, please, Plaintiff's AG for identification?

947 (The document was marked Plaintiff's Exhibit AG for identification.)

By Mr. Wiener:

Q. Mr. Littell, I show you Plaintiff's Exhibit AG for identification and ask you to examine it and after that I will interrogate you further concerning it. A. Yes, I remember this now. This is a memorandum to Joseph S. McPherson at Window Rock, Assistant General Counsel, dated March 26, 1962, from Walter Wolf, associate attorney, regarding this amendment.

Mr. Wiener: If Your Honor please, I am going to offer this in evidence on the ground that it is a document which has been in the possession of the defendant for over 15 months being part of Defendant's Exhibit 14, and I offer it independently because as now offered it will have none of the deficiencies which I believe attach to the original exhibit.

Mr. McKevitt: I object to the characterization about deficiencies, Your Honor.

The Court: You know, it is difficult to control attorneys, or stop them from using adjectives or adverbs, or different manner of expression.

Mr. Wiener: Well, let me amend that by saying, that it is free of the objections which I interposed to Mr. McKevitt's otherwise non-deficient exhibit.

The Court: All right, let me look it over first.
 948 What is the purpose of this exhibit? You stated the purpose?

Mr. Wiener: No; I will explain the purpose by reading one of the paragraphs.

Your Honor will recall that a week ago Mr. Pittle made the charge that Mr. Littell slipped something into to Amendment No. 11.

Now, paragraph 12 of this exhibit—

The Court: Where did this exhibit come from?

Mr. Wiener: This exhibit was among the legal papers in the files of the Legal Department at Window Rock that Mr. Stanley Zimmerman took and carried away in November, 1963.

Mr. Wiener: Because these were papers that the defense announced at the pretrial that they were going to introduce and they gave us copies of all their papers, and this is a copy.

The Court: Very well.

Mr. Wiener: Now, the purpose is shown by paragraph 12, which reads as follows, on page 3:

“Paragraph 2 (b) (2) provides for the amendment of the second paragraph of Section 4 (b). It deletes the phrase, ‘C. J. Alexander and other associate attorneys,’ and substitutes therefor the words, ‘other associate attorneys working on claims.’

949 Read in conjunction with the whole paragraph it attempts to amend, the above-quoted phrases are followed immediately by ‘retained by the said Littell at his own expense.’ Perhaps that phrase was intended to relate to Mr. Sonosky but it certainly does not relate to yourself or myself.”

And this is a memorandum from Mr. Wolf to Mr. McPherson.

And it continues:

“Therefore, I suggest that the phrase, ‘retained by the said Littell at his own expense,’ either be

deleted or that the paragraph be rewritten in order to reflect the facts."

I offer this to refute the wholly unfounded accusation of fraud which has been made here against Mr. Littell in this Court.

Mr. Pittle: If the Court please, I would like to respond to that. I cannot object to the document, we offered it ourselves, but counsel's statement now in his characterization, I submit, is wholly unwarranted.

The Court: Well, now, gentlemen, you all know me long enough to know this is not going to have any effect. If it becomes important you can argue it. You can draw whatever inference you think you should draw, and you can draw whatever implications or inferences you think you should draw.

950 Mr. Pittle: Yes, Your Honor, but I just want to call attention for the record that this is a document from Mr. Wolf, the associate or assistant to the General Counsel, to Mr. McPherson, another member of Mr. Littell's staff.

The Court: All right. It will be received.

(The document previously marked for identification as Plaintiff's Exhibit AG was received in evidence.)

By Mr. Wiener:

Q. Now, Mr. Littell, I would like you to turn to page 103 of the joint appendix, and you will see in paragraph 3 B that your basic contract was amended. Well, I ask you whether that shows that the basic contract was amended in the way suggested by Mr. Wolf to Mr. McPherson?
A. Precisely.

Mr. McKevitt: I object to that way of putting the question, suggested by Mr. Wolf to Mr. McPherson.

The Court: Well, won't it speak for itself? The document speaks for itself.

Mr. Wiener: Yes, it will speak for itself.

The Court: The amendment speaks for itself, how it got in there, unless he knows of his own knowledge.

Q. Do you know anything more about this amendment, Mr. Littell, than appears in paragraph 3 B at page 103?

A. Yes.

951 Or in the Wolf memorandum, Plaintiff's Exhibit

AG? A. That was the essence of technical corrections that Wolf suggested in the procedure which we always had on amendments, to have all the lawyers look them over, to see if there is anything wrong with them, and there was one important fact he omitted in that paragraph you read, namely, that Charles Alexander had resigned eight months before, and that the reference to Charles Alexander was simply surplusage in the contract.

The other point he omitted was that this is merely a recitation, and not at all words of obligation, it merely recited at the inception of this new contract that I had done a lot of work on claims with some other attorneys wholly at my expense.

Q. Now, that brings me to my next question. Will you take a look at the original contract, and turn to the provision that is being amended, and I think it is on page 41.

A. Yes, I have it.

Q. And I will ask you what connection the opening sentence of the first full paragraph on page 41 has with the assertion that you just made and that you also made in response to questions by Mr. Pittle that there was no obligation in the contract limiting you in the use of claims attorneys. A. Well it is the same thing. It merely makes a recitation.

952 Norman M. Littell, Claims Attorney for the Tribe, together with C. J. Alexander and other associate attorneys, retained by the said Littell at his own expense, has prepared and prosecuted in part, and is in the process of preparing and prosecuting on behalf of the Tribe, the following separate and distinct claims.

The purpose was to recite in entering the new period the work that had already been done.

Mr. McKevitt: Your Honor, I object to this because this is really argument. This should be in the briefs.

Mr. Weiner: Well, I let Mr. Pittle go on without objection, and I avoided lengthening the proceedings by making technical objections to Mr. Pittle's questions, and since he has opened the door, and I think I should have a certain latitude in getting the answers in.

The Court: Well, I have tried to give both sides a lot of latitude. In a case like this it is virtually impossible to keep out all hearsay and all conclusions, and everything like that, but this happens a lot in non-jury cases, and at the proper time I am going to have to divorce my mind from the things that I think are unimportant, or hearsay, or things that cannot be corroborated, and things like that, and I am going to rely in large part on you gentlemen a very fine and carefully prepared set of proposed findings of fact and conclusions of law, on both
953 sides. That is where counsel will help the Court.

Mr. McKevitt: Well, I withdraw the objection, Your Honor.

The Court: All right.

By Mr. Wiener:

Q. Mr. Littell, did you in connection with Amendment 11 slip anything into the contract?

The Court: Who said slip anything in?

Mr. Wiener: Mr. Pittle did in his opening.

The Court: In his opening statement? You see, I didn't even recall.

Mr. Wiener: And I took very serious objection and exception to it.

The Witness: Certainly not.

The Court: He may use that during his argument, when you argue the case.

All right, let us proceed.

The Witness: Certainly not, Mr. Wiener.

By Mr. Wiener:

Q. Now, is there anything in the Navajo Tribal minutes to show that you considered Healing vs. Jones to be a claims case after a certain time? A. Yes.

Q. You recited some minutes to Mr. Pittle the other day.

954 Do you have with you the minutes of the Navajo Tribal Council for February 5th, 1958, and I will take them one at a time, I think it will be easier. I will have to get them out.

You are now referring to Council minutes?

Q. To the Council minutes for February the 5th, 1958, or perhaps if I can simplify it, what is the first set of Council minutes in time that contain a reference by you to Healing vs. Jones as a claims case?

Mr. McKevitt: I object to this, Your Honor. I am not going to object to this very much, but I think this is a conclusionary statement, and this is one of the things that should be briefed.

Mr. Wiener: Your Honor, may be approach the bench?

(Thereupon, counsel approached the bench and the following occurred:)

Mr. Wiener: We have had several questions by Mr. Pittle to Mr. Young about this, and he asked about the Navajo Tribal minutes, and what is the purpose of the Tribal minutes, and did you find this or that or the other thing, and we also offer it on the grounds of questions put by Mr. Pittle to Mr. Littell.

The Court who is Mr. Young?

Mr. Pittle: He was the Tribal Operations Officer.

Mr. Wiener: He was the one that dressed up the
955 white paper.

Mr. McKevitt: Well, I am simply complaining about the form of the question.

The Court: Do you want to rephrase the question?

Mr. McKevitt: Mr. Wiener puts it in the question, the first time it happened, but I was only objecting as to form.

The Court: All right, let us proceed.

Mr. Wiener: I was trying not to waste time on this.

(Thereupon, counsel resumed their places in the courtroom and the following occurred:)

The Witness: I know I am out of order, Your Honor, and counsel, but if I could take these in the order in which I had them arranged it would probably save time.

By Mr. Wiener:

Q. Well, first there is a preliminary question. Did you in your examination of the minutes of the Navajo Tribal Council find any references in statements made by you before the Tribal Council to Healing vs. Jones as a claims case? A. Yes.

Q. Now, my next question is, will you please, proceeding chronologically, give His Honor a list of the Council minutes in which those references appear? What is the first one? A. May I take them in reverse from 1963? I 956 just happen to have them arranged this way?

Q. Yes, it doesn't make any difference. A. You get an orderly picture that way.

The first example I give you is the record of the Tribal Council of April 13th through May 17th, 1963, in which if you care to take these—

Q. Give me the pages. A. The pages which I had copied, pages 529A to 529D, constitute my report to this budget session, and I have given you copies of these pages to show you the discussion of expenses on Healing against Jones as a claims case, and without reading the whole thing, in the opening paragraph—

Q. Please don't read it. A. Very well. Now that lists the claims cases expenses.

Mr. Wiener: I ask that the document the witness has just handed me be marked Plaintiff's Exhibit AH for identification.

(The document was marked Plaintiff's Exhibit AH for identification.)

Mr. Wiener: I offer this in evidence, Your Honor.

The Court: In this a copy of the minutes ?

Mr. Wiener: It is a copy of the minutes, and I offer it in evidence, an except for one set of these minutes, I don't propose to have them read.

I think they are basically matters of arguments
957 from documents and we will take them up then.

The Court: Is there any objection?

Mr. McKevitt: Your Honor, I haven't had any objection to this one, but I will to the others, because of the date. This is dated May 8, 1963.

The Court: May 8, 1963.

Mr. McKevitt: This particular resolution, to which he refers here, Amendment No. 11, was adopted a year earlier. Our charge is that there was a failure to disclose by counsel at the time the amendment and the resolution was adopted, that Healing vs. Jones was to be transferred as a claims case.

The Court: Well, let me see that.

Mr. Wiener: Do you want to hear me on that, Your Honor?

The Court: Let me just read it.

All right, I will hear you briefly.

Mr. Wiener: Your Honor, it certainly shows ratification and it also is evidence in support of the allegation in paragraph 10 of the complaint, that the Secretary's grounds for cancellation was subterfuge, and it is further relevant in connection with the belatedly formulated contention of unclean hands, that the dirt is all on the Secretary's hands.

The Witness: Counsel, I hadn't quite finished—

Mr. McKevitt: I object to that last characterization, Your Honor.

958 Mr. Wiener: This is argument.

The Court: Well, it is difficult to keep personalities out of cases, such as this, or characterizations.

This is one of the things I am going to have to decide, I suppose, as an issue in the case, as to whether or not the

plaintiff did come into Court with clean hands or not, and that will depend upon the evidence at the time you argue it.

All right, I will admit it.

(The document previously marked for identification as Plaintiff's Exhibit AH was received in evidence.)

By Mr. Wiener:

Q. Was there anything else in connection with Plaintiff's Exhibit AH, Mr. Littell, bearing on claims or are there other excerpts from the same meeting bearing on claims? A. Precisely the next page, here it is. This is a discussion of the 10 per cent applicable to all claims reported in the budget, and this is the budget of the first Nakai administration, the budget of 1963.

Q. Then I offer the next item on the same issue.

The Court: Excuse me, Mr. Wiener, at this point and before you start on the next item, I am going to have to recess a little bit longer today. So we will return at 2:00 o'clock.

(Thereupon, at 12:30 p.m. a recess was taken until 2:00 o'clock p.m.)

959

After Recess

(The trial was resumed at 2:00 o'clock p.m. pursuant to the recess:)

Thereupon

Norman M. Littell

resumed the witness stand pursuant to the recess, and testified further as follows:

Cross Examination (resumed)

Mr. Wiener: Your Honor, when we recessed for lunch, the witness had just handed me a document, representing the next succeeding page, and I would like to ask that this be marked AI for identification.

(The document was marked Plaintiff's Exhibit AI for identification.)

Mr. Wiener: I offer this in evidence.

I imagine that within the same objection and the same ruling, it may be received?

The Court: Do you object to this?

Mr. McKevitt: Yes, I do object, Your Honor.

The Court: What does it purport to be?

Mr. Wiener: This is the next page after AH, which was admitted.

The Court: All right, it will be received.

Mr. McKevitt: Your Honor, I want to point out, this is a whole year after Healing vs. Jones, No. 11, was
960 adopted. That is my objection. It has nothing to do with the disclosure of counsel a year after the event.

The Court: For what purpose is it being offered?

Mr. Wiener: It shows ratification, and it is further evidence in support of our allegations in paragraph 10 of the complaint, that the grounds asserted for termination constituted subterfuge.

Mr. McKevitt: You understand our position, it is failure to disclose in 1962 when Amendment 11 was passed, that the defendant charged, and this is completely after the event.

The Court: I will admit it.

(The document previously marked for identification as Plaintiff's Exhibit AI was received in evidence.)

By Mr. Wiener:

Q. Now, going back, Mr. Littell, from this meeting of the Navajo Tribal Council of May 8, 1963, what is the next earlier set of minutes of the Tribal Council in which you have found a reference to Healing vs. Jones as a claims case? A. February 21st, 1962.

Q. And on what pages do those references appear? A. My report begins on page 251 of that date, under two classifications, in explaining pending cases of the Navajo Tribe.

A is Navajo Tribal claims cases, one under that.

Subhead (1), Land Claims Before the Indian
961 Claims Commission.

Subhead (2) is Healing against Jones, the Navajo-Hopi Boundary Line case.

Subhead (3), the Navajo Tribe Against United States in the Court of Claims.

Subhead (4) is the Utah School Land Sections case, 030009, and you have here only pages 252, I believe, to—

Q. And 253? A. To 253, to answer your question.

Mr. Wiener: Will you mark this please, for identification?

(The document was marked Plaintiff's Exhibit AJ for identification.)

Mr. Wiener: I offer this in evidence under Your Honor's prior ruling.

Mr. McKevitt: May I ask a few questions on this on voir dire, Your Honor?

The Court: You may.

By Mr. McKevitt:

Q. I take it, Mr. Littell, Plaintiff's Exhibit AJ for identification is a photostatic copy taken from somewhere else? A. A Xerox copy from the Council records, which are here for your examination if you wish.

Q. When were these Council records written up? A. They are written up by the Tribal staff at Window Rock,
962 Arizona, and a copy is sent to the General Counsel's office.

Q. In other words, this AJ for identification was taken from documents which were written up when? When would you say they were written up? A. Well, counsel, that depend on the state of the Tribal staff. Sometimes it takes a month or two after the Council meeting, sometimes that staff is low, and they cannot get the volume out, or the meetings are too numerous, so I can't answer your question exactly as to when that was written, but this was

written in the ordinary course of business and as fast as the staff could get it out.

Q. How long have you had that blue document in your office? A. Oh, I have had that since that year, but exactly when it was received—let me see if there is a mark when I received it.

No, but on the cover page here it says, Reporting Department, Window Rock, and the date, but I got it some time, subject to qualification as I just stated, within a reasonable time after the date given.

Mr. McKevitt: May we read this a minute, Your Honor?

By Mr. McKevitt:

Q. I have just one more question, Mr. Littell. This is a two-page excerpt. Roughly, how many pages in 963 the document from which it was taken? A. What page is that, counsel?

Q. This was page 252. A. This report was scattered over some pages, but the parts we are considering now begins at page 251, as you can see by examining it.

Q. I simply want to know how many pages in the blue document you have in your hand from which these two pages were taken? Just the whole book. A. Well, as long as you want to ask the question, this is the way it works.

Q. I want to get a simple thing. How many pages in that book? What is the last number? A. How many pages in the book?

Q. What is the last number? A. 353 in this volume.

Q. And that blue book you have in your hand is the minutes of the Tribal Council meeting that went on for how long? A. That is February 12th to 23d, 1962.

Mr. McKevitt: That is all I have on voir dire, Your Honor.

I am going to object on the ground of relevancy, Your Honor.

The Court: I will override it. It is received.

964 (The document previously marked for identification as Plaintiff's Exhibit AJ was received in evidence.)

Mr. Wiener: I might say, Your Honor, that AJ is part of the minutes of February 21st, 1962, and Amendment 11 is dated 20 April, 1962.

The Court: All right.

By Mr. Wiener:

Q. Now, going back in time, Mr. Littell, when is the next previous date in which mention was made before the Navajo Tribal Council of Healing vs. Jones as a claims case? A. February the 6th, 1961, in a volume entitled Record of the Navajo Tribal Council of the Navajo Tribe, January 30th to February the 16th, 1961.

Q. Do you have an excerpt from those minutes? A. I do. There is rather exhaustive consideration of this matter.

Mr. McKevitt: I object to the characterization, Your Honor.

The Court: All right, strike that.

By Mr. Wiener:

Q. You have handed me a document containing about ten pages, which is numbered in pencil from 20 to 28.

I will ask that that document be marked as Plaintiff's Exhibit AK for identification, Your Honor.

(The document was marked Plaintiff's Exhibit 965 AK for identification.)

Was this AK for identification, Mr. Littell, a part of the minutes as transcribed in these regularly multilith minute books? A. No, sir.

Q. How was this matter presented to the Council? A. This was in executive session.

Q. Were minutes taken when the Council went into executive session? A. Yes, of course.

Q. And who was present when the proceedings that are recorded in Plaintiff's Exhibit AK for identification transpired? A. All of the Council to the extent that they were present that day. I would have to look back at the opening session of that morning to see if there were any absences.

Q. Was there a quorum? A. Oh, yes, or you would not have this business transacted.

Mr. Wiener: I offer this in evidence.

The Witness: And in answer to your question, there were representatives of the Bureau present also, and some Tribal officer, I am just looking to see who it is. Scott Preston, Vice Chairman, was presiding as Chairman at this time, I believe.

966 The Court: The same objection?

Mr. McKevitt: Your Honor, I have a few more questions about this.

The Court: This is Plaintiff's Exhibit AK?

Mr. Wiener: Plaintiff's AK for identification, Your Honor.

The Court: What is the date of that?

Mr. Wiener: February the 6th, 1961.

The Court: Is this the minutes of the meeting?

Mr. Wiener: This is the minutes of the executive session of the Council meeting.

By Mr. McKevitt:

Q. Mr. Littell, you are holding in your hand now a blue book? A. Yes, sir.

Q. Will you tell the Court what that blue book is you have in your hand right now? A. I identify it, as I did before. It is the Record of the Navajo Tribal Council of the Navajo Tribe, January 30th through February 16th, 1961.

We are now looking at, I am looking at page 148.

Q. How many pages in that book? A. 421.

Q. Did you say Plaintiff's AK for identification is taken from that book? A. No, sir, I said it was omitted
967 from that book. This is not in the published record of the Tribal Council.

Q. In other words, the blue book that you have in your hand is the written minutes of the general public session of the Council for that period; is that right? A. It is, ex-

cept that the executive session minutes are part of it but they are kept in a separate file, like other executive session minutes.

If I might explain, it might be helpful, counsel. Sometimes when personnel matters were discussed or vital competitive information in oil business, or some other business, or a personnel matter like this, in relations between attorney and client the Executive Secretary by general practice over quite a period of time held those executive session minutes out of the main book, which is really Tribal files, Navajo office files.

Q. Let me ask you this: Are all executive session minutes written up? A. Yes, sir. Just the same as any others.

Q. Are they written up at the same time? A. Yes, sir.

Q. But you say they are not put in the book which reproduces the minutes before the open sessions; is that right? A. Counsel, I do not wish to mislead you in any way. There are some executive sessions which are held as such merely because they don't want the press present, and they don't want publicity on the subject, but there is nothing particularly—

Q. I just want to get this straight, Mr. Littell. A. These are in.

The Court: Now, just a minutes. One at a time.

By Mr. McKevitt:

Q. There are some executive session minutes, I understand, that are in that book? A. I haven't examined the book to determine, but this is the only one I know.

Q. But Plaintiff's Exhibit AK for identification are not in that book? A. They are not, but there is notice of it here.

Q. Tell me, when the executive session minutes are written up, are they distributed just as the other minutes are distributed, on the same basis? A. No, sir, they are kept in the Tribal files.

Q. Only in the Tribal files? A. The Tribal files, available to Council men and officers.

Q. Does a copy go to you? A. This went to me in this particular case because it pertained to my statements on the attorney contract.

No, I am sure I don't have all of them but this pertained to the Legal Department.

969 Q. You don't know then whether all of these executive Council sessions were written up? A. Yes, as far as my general knowledge of it is, that they are. They are to be written up in stride along with the rest.

Mr. McKevitt: May I have one second to look at this, Your Honor? These are not documents that were listed in the pretrial. We haven't had copies of them.

The Court: You may examine them.

By Mr. McKevitt:

Q. You obtained them then, Mr. Littell, from the official records of the Tribe? A. It was sent to me by the reporter. This is taken from my own file copy of it, sent to me.

Q. Is this your file or the official record of the Tribe? A. The official record of the Tribe. It is a copy of the one that is in the Tribe's file, an exact copy, except for some penciled suggestions on clarification there, which are my own.

Q. In other words, there are certain penciled interlineations on this? A. Yes, sir, those are mine—

970 Q. As your editorial— A. Those are my suggestions for minor corrections in this record, yes.

Q. were they put in, do they go back and the same interlineations put in the official Tribal copy? A. I send a copy in with these suggestions, and what became of it, I don't know. I mean, it went to the Tribal file, and whether my interlineations there were ever put into the final copy, I really don't know.

Mr. McKevitt: Your Honor, as to that first one, this has not been identified as an official copy of the records of the Tribe. It is simply one that contains interlineations added by counsel on his own, and therefore I don't think this is an authentic copy.

The Court: Well, let me see it.

Mr. Wiener: Your Honor, it seems to me this is obviously Xeroxed. The witness has explained how he got it.

Mr. McKevitt: I am not complaining about the Xerox.

Mr. Wiener: And the Tribal files, as the evidence shows, have been rifled by Mr. Zimmerman.

Mr. McKevitt: I object to that last remark, Your Honor.

The Court: Well, strike the word "rifled."

Now, can't you stipulate that this is a copy of the official minutes, with the exception of the notations that were made in there by Mr. Littell? After all, where could he have gotten these?

971 Mr. McKevitt: I understand that.

The Court: You are objecting to these notations?

Mr. McKevitt: I object to the notations.

Mr. Wiener: I will agree that the notations are no part of it.

The Court: All right, it is received with the understanding that the notations are not part of it.

Mr. McKevitt: I also object on the ground of relevancy, Your Honor.

The Court: Overruled, it is received.

(The document previously marked for identification as Plaintiff's Exhibit AK was received in evidence.)

By Mr. Wiener:

Q. Now, this last Exhibit AK was February 6th, 1961. Going back, is there any earlier set of Navajo Tribal Council minutes in which Healing vs. Jones is discussed as a claims case, and if so, what is the date of that next preceding meeting? A. Well, I would take June of '61, that is the same year, but the thorough consideration isn't here, the discussion before the Council is the one you have just introduced.

Q. That is AK? A. Yes, a ten-page discussion.

972 Q. When is the next reference you find, giving the date and the page of the Council meeting? A. June 23d, 1961, page 843.

Q. Do you have an extra copy of page 943? A. I have that copy referring to the 10 per cent clause.

Mr. Wiener: Will you mark this for identification, please as Plaintiff's Exhibit AL?

(The document was marked Plaintiff's Exhibit AL for identification.)

Mr. McKevitt: What was that number?

Mr. Wiener: AL.

Mr. McKevitt: Excuse me, counsel, I don't seem to have a copy of the one before.

Mr. Wiener: I gave it to you. Oh, no, I didn't.

The Witness: This is my marked copy.

Mr. Wiener: Just a second, I have a copy of AK.

By Mr. Wiener:

Q. Mr. Littell, is there anything that needs to be said about Exhibit AL other than what is apparent on the document? A. No. There is a question about the 10 per cent clause, and Mr. McPherson replied to it in this instance.

Mr. Wiener: I offer this in evidence, Your Honor, and I point out it is before the date of Amendment No. 11.

Mr. McKevitt: May I ask a few questions about this, too, Your Honor?

973 The Court: Yes.

By Mr. McKevitt:

Q. Now, Plaintiff's Exhibit AL for identification is one page, in other words, it is a Xerox copy, page 843, and what was it taken from, Mr. Littell? A. Counsel, the same Council minutes, budget session, Volume 2, June 5th through June 30th, 1961.

Q. What is the total number of pages in that volume? A. 1,013.

Q. And this is the only mention of this subject that you

found in that entire volume? A. Counsel, the preceding volume has the extensive discussion.

Q. I will withdraw that. A. You see, this is all a continuous operation.

Mr. Wiener: All right, the question is withdrawn.

The Witness: There may be more of it. That is all I have at this place.

Mr. McKevitt: Your Honor, we object to this first, on the grounds of relevancy.

The Court: What date is this?

Mr. McKevitt: This is Plaintiff's Exhibit AL for identification, dated June 23, 1961.

The Court: All right, 1961.

Mr. McKevitt: Amendment No. 11 passed in 1962,
974 Your Honor, and our charge is there was a failure to disclose at that time this Healing vs. Jones change had taken place. There was a discrepancy between the actual amendment that was made.

We believe that just the mere mention of Healing vs. Jones in one small two-line run—well, I should not characterize it further, I guess. But it is irrelevant to any issue before the Court.

The Court: I will hear you. Do you offer it for the same purpose?

Mr. Wiener: If the Court please, I offer it for the same purpose, and if I may explain.

The Court: What paragraph do you say is pertinent on this?

Mr. Wiener: It is pertinent to paragraph 10, the subterfuge charge.

The Court: In this exhibit, I mean.

Mr. Wiener: Oh, you might say it is the heart of the page. I think it is Billison's fourth paragraph.

I would like to ask two questions, Your Honor.

The Court: All right.

Mr. Wiener: It is the fifth paragraph down on the page, and then McPherson's first paragraph.

The Court: All right, I will admit it.

(The document previously marked for identification as Plaintiff's Exhibit AL was received in evidence.)

By Mr. Wiener:

Q. Now, do you have further minutes, Mr. Littell, bearing on your mention to the Council, to the Navajo Tribal Council of Healing vs. Jones as a claims case? A. You are not now referring to these minutes of February the 6th?

Q. No, no. A. Which we discussed at full length.

Q. No, that is already in. I am talking about in addition to the items already received in evidence. A. And then therefore you are not referring to the chronological step of the minutes of September 24th before the Advisory Committee?

Q. No, because they are in evidence also. Will you continue? A. The furthest back that we get in this new contract is the very date of the interim contract, August 7, 1957, in a volume entitled Minutes of Navajo Tribal Council meeting held July 29th, 1957, to August the 8th, 1957, and which also contains the Advisory Committee minutes of July 30th and August 1, 1957, according to a note on this paperback edition.

Q. And you have handed me one page marked 248?

976 A. That is one page taken from my discussion, which began on inquiry from the Chairman, James Bassette, as to renewal of the contract, which began on page 245 and went right along for some distance, but this particular page is where I was explaining claims.

Q. Don't characterize it further. A. And that is 248, again one page.

Mr. Wiener: Will you mark this for identification?

(The document was marked Plaintiff's Exhibit AM for identification.)

Mr. Wiener: If the Court please, I offer Plaintiff's Exhibit AM for identification in evidence, less the penciled mark, and the asterik in the margin, and I offer this in answer to the point made by Mr. Pittle last week in his examination of Mr. Littell that the claims compensation of 10 per cent was never at any time disclosed to the Navajo Tribal Council.

Mr. Pittle: If the Court please, that is misstating my point. I must state it for the record.

The Court: Do you want to ask him any questions?

Mr. McKevitt: I would like to, Your Honor.

The Court: All right, go ahead.

By Mr. McKevitt:

Q. Plaintiff's Exhibit AM for identification consists of one Xerox page, Mr. Littell, and can you tell us
977 from what this particular one page was taken?

A. Give me that page again, counsel. I have lost it.

Q. Page 248. A. The Council arrived at August 7th—

Q. I just want to know the document, the volume. A. Oh, it is my answer to questions from the floor of the Council about the renewal of the contract, which was expiring that very day or the next day.

Q. Will you tell me, do you have another blue book in front of you at this time with respect to this Council meeting back in August, 1957? A. Well, it just doesn't happen to have a blue cover on it, but it ought to have for protection, and I will get one on it.

Q. In other words, you have in your hand amimeographed— A. It is the same thing exactly as I described before.

Q. Will you read what that purports to be, that book?

A. I did. It is right in the record. I read it when I started. The Minutes of the Navajo Tribal Council held July 29th, 1957, to August 8th, 1957.

Q. How many pages is that? A. There are some exhibits attached to the back. 311 plus some attachments in the back.

Q. In 1957, this was just about the time that you were coming up to the end of your first contract and to the renewal of the second 10-year period: is that right? A. That is what I explained, counsel. It was that very day.

Q. Was Healing vs. Jones started as a case at all at that time? A. No, sir. That is explained in the succeeding minutes which we passed by, because they are already an exhibit.

Q. You already had a contract which said that you were to get 10 per cent for the claims work and you had pending claims cases in the Court of Claims?

Mr. Wiener: If the Court please, I think this exceeds the scope of voir dire.

The Court: Let me ask you something on both sides. You know I have been very liberal and allowed both sides a lot of latitude.

Don't you think we have had enough on these minutes in order to make your record?

Mr. Wiener: Well, that is my next question of the witness, because of the allegation, if Your Honor please, the allegation is that Mr. Littell hornswoggled his client by slipping something over on it.

The Court: I don't think he used the word hornswoggle.

Mr. Wiener: Overreached.

The Court: Overreached.

979 Mr. Wiener: Overreached his client.

Mr. McKevitt: And unclean hands, Your Honor.

Mr. Wiener: And unclean hands, and I am now showing, and our allegation is that these reasons are a subterfuge. I am now going patiently, quietly, and I am afraid rather long-windedly through the minutes to show that there is not a shred of truth in support of the allegation that he overreached the Indians, and to establish the truth of our counter-allegation of subterfuge.

Now, unhappily, it takes a lot of documents.

The Court: Well, then, you have got the problem, as I see it, that the former Solicitor named Stevens rendered a decision some time ago in which he held that Healing vs. Jones was a claims case.

Mr. Wiener: Yes, Your Honor. That is Exhibit I.

The Court: Now Mr. Barry says, no.

Mr. Wiener: Yes, that is correct.

The Court: That Mr. Stephens was wrong. That his opinion is that it is not a claims case.

So you have two different opinions on that subject matter. And then they expect the Court to resolve it.

Now, it seems to me that this kind of evidence is material on the question of intent on the part of this plaintiff. Did he hoodwink these people or not, so to speak? Did he overreach them? Was he lying to them when he was
980 doing allegedly claims work as a result of his retainer on the General Counsel's job? This is what the Government claims. That all these things were done on the time that he should have been devoting to General Counsel work; correct?

Mr. Wiener: Well, that is part of it.

The Court: That is the Government's contention.

Mr. McKevitt: That is part of it.

The Court: I understand. All right, let us proceed.

Mr Wiener: May I renew the offer?

The Court: All right, it is received.

(The document previously marked for identification as Plaintiff's Exhibit AM was received in evidence.)

The Court: How much more do you have?

Mr. Wiener: I think two other items and then I move on.

By Mr. Wiener:

Q. Mr. Littell, have we gone over any items in the minutes for February the 5th, 1958 that bear on the matter of Healing vs. Jones as a claims case being disclosed as such to the Council? A. I believe that was cited the other day.

Q. That is why I am asking. A. But my list was confined today to those specific references.

I have got a box full of the other citations that I
981 gave the other day.

Q. Perhaps I can simplify this. There were two questions asked the other day, first, did you ever disclose that Healing vs. Jones as a claims case would net you 10 per cent. Do you remember that question? A. Yes, indeed.

Q. And these documents that you have adduced today in response to my questions bear on that issue; is that correct? A. Exhaustively, yes.

Q. Now, are there also additional Council minutes that show Healing vs. Jones discussed as a claims case without mention of compensation, that you referred to the other day as being dated February the 5th, 1958, and January the 11th, 1960? A. Yes, counsel.

Q. All right, will you produce those? A. But you don't keep repeating it, when you spell it out.

Q. Will you produce those? Let us have first January the 11th, 1960. A. Yes; I have no copies of these papers.

Q. We will take care of copies later. Would you state the pages of the minutes of January the 11th, 1960, on which Healing vs. Jones is referred to as a claims case?

A. Pages 19 and 20, and they are two short para-
982 graphs if you want me to read them in the record.

Q. No, I don't want them read. A. They distinguish between the claims case before the Indian Claims Commission, the Hopi overlap, and the Hopi Boundary Line case, which is Healing against Jones.

Q. Are there any additional pages? I just want the page references.

To refresh your recollection, do you have anything on page 30 and following, and 40 to 50? A. Yes, sir.

Q. All right, and will you state those pages for the record? A. Page 30 is an extensive consideration of Healing against Jones over to the top of page 31.

What did you say the other page was?

Mr. McKevitt: Your Honor, I don't think he should say what it is, but just give the page number.

The Court: All right, just the page number.

By Mr. Wiener:

Q. Just the pages. Page 40? A. 36 seems to have another one.

You said 40?

Q. 40 through 50. A. That is correct; they are here.

Mr. Wiener: If the Court please, I offer in evidence as Plaintiff's Exhibit AN, the pages of the Navajo Tribal Council from January the 11th through January 22d, 1960, which have been identified by the witness, and I will ask that the book itself be marked for identification, and ask for leave to withdraw the book and have copies made, and to substitute as the exhibit in evidence the pages of this.

The Court: Are these minutes also?

Mr. Wiener: Yes, sir.

(The document was marked Plaintiff's Exhibit AN for identification.)

The Court: Any objection?

Mr. McKevitt: I make the same general objection, Your Honor.

The Court: You have an objection on this, a running objection to this?

Mr. McKevitt: Yes, sir.

The Court: What pages are being offered?

Mr. Wiener: The pages being offered are 20, 21, 30, 31, 40 to 41, 47 to 50.

Mr. McKevitt: For the record, consisting of 337 pages?

Mr. Wiener: Yes, sir.

The Court: All right, they are received.

(The document previously marked for identification as Plaintiff's Exhibit AN was received in evidence.)

Mr. Wiener: It is understood that this will be withdrawn and copies substituted?

984 The Court: Yes.

By Mr. Wiener:

Q. Do you have anything in the minutes of February 5th, 1958, Mr. Littell, that refers to Healing vs. Jones as a claims case? A. Yes, page 88.

Do you have any other pages?

Q. No, I have no others. A. Page 88, I discuss it there, the item after the Navajo-Hopi land dispute.

Mr. Wiener: On the same basis as the previous offer, if the Court please, I ask that the book, headed Minutes of Council Meeting of February 3d to 20, 1958, be marked for identification as Plaintiff's Exhibit AO.

(The document was marked Plaintiff's Exhibit AO for identification.)

Mr. Wiener: And that leave be given to withdraw and make a copy, and that when the copy of page 88 is made, that page 88 shall stand as Plaintiff's Exhibit AO.

The Court: All right.

Mr. McKevitt: What is the total number of pages?

Mr. Wiener: The total number in this book is 466 pages.

The Court: All right, it is received.

985 (The document previously marked for identification as Plaintiff's Exhibit AO was received in evidence.)

By Mr. Wiener:

Q. Now, Mr. Littell, turning to the claims status or otherwise of Healing vs. Jones—are there any more minutes? A. I think these pertain to the School Land Sections case, I am not sure.

Q. Well, I am not there yet.

Turning now to the claims status or otherwise of Healing vs. Jones, and to your present contention that Healing

vs. Jones was established as a claims case, was there a time when Healing vs. Jones was not a claims case under your interpretation of your contract? A. Yes, I would never have contended that it would be a claims case had we been able to settle the problem in the Department of the Interior by administrative proceedings, which were in fact instituted.

Q. And when in your judgment did Healing vs. Jones lose its identity as a General Counsel case and become a claims case? A. I would identify two dates for that, one was the passage or approval by the President of the Act of September, or was it July—

Q. September 22d, 1958. A. September 22d, 1958, authorizing the three-judge Court case, and this was 986 after it became apparent to everybody that no administrative solution could be found, including the Department of the Interior; and then in the filing of the pleadings, first the Hopi petition, and then our complaint or petition, and the Government's intervention, and the Government's motion to dismiss the proceedings for lack of jurisdiction.

By The Court:

Q. Now just a minute. I would like to ask the witness a question.

You have stated your opinion that as of September 22d, 1958, Healing vs. Jones became a claims case; is that correct? A. Yes, I identify two dates, the action of the Government in further denying the relief sought by the Navajo Tribe, or the Hopi Tribe for that matter, and thereby denying access to the Navajo Tribe to the use of lands to which they were rightfully entitled.

Q. Well, now, in view of the fact that you have two opinions, conflicting opinions, one by Solicitor Stevens—when was he Solicitor?

Mr. Wiener: He was Solicitor toward the end of the Eisenhower Administration. And then Mr. Barry was brought in by Secretary Udall.

The Court: So their opinions are diametrically opposed to each other, I take it, as to whether Healing vs. Jones is a claims case or not.

987 Mr. Weiner: As a matter of fact, there is in evidence an earlier opinion of Solicitor Stevens holding that it was not a claims case. The first opinion was Plaintiff's G, 15 November, 1960, and Mr. Stevens said it was not a claims case.

Then on the basis of additional documents, principally the minutes of the Advisory Committee of 24 September, 1957, Plaintiff's K, Mr. Stevens in Plaintiff's I changed his opinion.

The Court: Well, now I would like for my information to find out from the witness why he feels and why he thinks that as of September 22, 1958, Healing vs. Jones became a claims case, and find out what he knows about it, and why he comes to that conclusion.

The Witness: Well, this is the decisive date as far as I am concerned, implemented by the actual intervention of the Government, on a later date, when they filed, which I forget, their motion for intervention, because this was the conclusive recognition of what actually had been established, and that the Government denied to the Navajos recognition of their settlement and their exclusive settlement rights in this controverted area that I pointed out on the map.

What is the exhibit number of that, counsel?

Mr. Wiener: The Navajo-Hopi map is Plaintiff's Exhibit Z.

The Witness: Plaintiff's Z, and they have been there from time immemorial, as we showed, but the Government had never conclusively recognized their rights, and in fact, had pushed them back twice from an area of occupation where the Secretary had settled them, and what I am saying is best illustrated in the findings of fact and conclusions of law of the three-judge Court in the case, which I can readily refer to.

By The Court:

Q. Well, that is 210 Federal Supplement? A. Yes, sir.

Q. Written by Judge Hamley? A. Yes, sir, and I am referring specifically to the findings of fact and the conclusions of law which established these three things, these three conclusive dates, which was exactly what we had contended over many years, but unsuccessfully, namely, that the Navajos were settled in all of that area, outside of the Hopi Land Management District Six, which is now the Hopi boundary line of the Hopi Reservation as a result of this decision; that they were conclusively settled there by the approval of the Secretary of the H. G. Harrington Report on February the 7th, 1931; and the Navajo Tribe was conclusively settled there as a Tribe on June 2d, 1937, when the Secretary approved the grazing regulations of the Navajo Tribe, which embraced the entire area occupied by the Navajos outside of Land Management District Six;

And third, and last, the Court conclusively held
989 that the Navajos who were in that area for the purposes of residence, I take it to distinguish between any Navajo who happened to be passing through or visiting there, that were there for the purpose of residence were legally settled there as of the Act of September 22d, 1958.

And up to that time the status was exceedingly equivocal, and the Navajos were denied full unqualified recognition of their right to use, occupy, own and exercise dominion and control and full proprietary interest over these areas, although they were there.

Q. Let me ask you a question. In connection with the compensation that you hope to receive, or hope to receive in the future, of 10 per cent in connection with this claims work—and I understand from the record he has received none of that money?

Mr. Wiener: That is correct.

The Court: As a result of any work he did in the past?

Mr. Weinier: That is right.

The Court: He hopes to receive 10 per cent of something?

Mr. Wiener: He hopes to receive something. He has not formulated this.

The Court: What could he possibly receive by way of claims work in connection with Healing vs. Jones?
990 What is that going to amount to?

Mr. Wiener: Well, I will have to ask the witness, Your Honor.

The Court: Let us find out.

The Witness: Well, this is a point at which we should never have arrived or would never have had a dispute or conflict, except that it was prematurely raised as this charge of predatory overreaching. It is something that was being negotiated with the Hopi Tribe, and as some guide to what you are asking, the Hopis have approved over \$700,000 for their attorney for getting clear and unequivocal rights to their land, and what is now considered, that they now consider to be an undivided half interest in the controverted area, plus \$220,000 as a bonus, raising their fee to around a million dollars.

Quite frankly, I would never have expected to claim any such thing, and the reading of these records would reveal that I was completely flexible in this matter, after the character of the reservation changed from the days when I originally took it, to develop mineral and oil resources, than were then known about.

This is a matter of discussion with the client. It is not a matter that can be—

By The Court:

Q. That is what I want to find out. Who sets your
991 fee or who will set your fee if the time comes when you will be allowed 10 per cent for the claims work you did. Who will it be up to say how much you earned or

will earn, rather? A. The usual procedure in that, I would say, without reaching this stage of negotiations, and without prejudice, the usual way this is done in Indian claims work which, of course, has been going on for a couple of generations, is that after it has been determined what has been recovered, then there is an evaluation, if there is any dispute or question about the 10 per cent.

There would, in my opinion, never have been any question about the 10 per cent. I would no more think of evaluating that land for oil and gas resources and ask for 10 per cent of it than flying to the moon. I just wouldn't do it.

It would be a matter of agreeing with the Tribal Council as to what was a reasonable value.

Now we have some estimate, based upon what the Hopis have approved, and I understand some evidence on that has been included in the subpoena, as to what the Department has done in respect to the Hopi fee.

Q. Now, the Bureau of Indian Affairs and the Department of Interior through the Secretary would have to approve any award? A. Eventually they do, Your Honor, and then it goes to Congress for an appropriation.

992 This is the historic way it is handled.

The Court: Well, as I understand it, from *Healing vs. Jones*, the Government took the position or is taking the position that this was simply a case to quiet title of property. They don't take the position it is a claims case.

Mr. Wiener: I don't know what the Government thinks about it, but the Court of Appeals—

The Court: Well, what did the Court of Appeals say?

Mr. Wiener: The Court of Appeals in footnote 12 says this, at page 8 and 9 of the opinion: The Department of Justice challenged the jurisdiction of the Court to hear the case and otherwise sought to protect the Government against the claims of the contending parties. Jones for the Navajo Tribe successfully opposed the position of the Gov-

ernment, *Healing vs. Jones*, 174 Fed. Supp. 211. After extensive pretrial proceedings, the case was disposed of by a special three-judge Court. The exhaustive opinion of Circuit Judge Hamley occupied some 67 pages of the printed reports as he traced the history of the problems presented and explored the contentions of the respective Tribes with regard to the 1882 reservation. The interest of Congressman, later Secretary, Udall, was noted by Judge Hamley, 210 Fed. Supp. at 189.

It is reasonable to deduce that preparation and presentation of the case by respective counsel must have entailed great skill and professional attainments of a high order. Substantial advantages were gained by the Navajo Tribe, *Healing vs. Jones*, 210 Fed. Supp. 125. The Supreme Court affirmed, 373 U. S. 758. The appellee was of counsel at all times, according to the official reports. That is the end of the footnote.

Then continuing with the text: Whether that action should have been classified as a claims case or considered part of the General Counsel's normal service seems to have been in question.

And then in a footnote under that is: By Amendment No. 11 to the Navajo Tribe attorney contract, the cases of *Healing vs. Jones* and *Navajo Tribe vs. State of Utah* had been added to the claims specified in 4 (b) of the 1957 contract. The amendment was approved for Secretary Udall as of July 26, 1962, by Assistant Secretary Carver.

The Court: Was that Amendment No. 11?

Mr. Wiener: That was Amendment No. 11.

The Court: And approved by the Secretary in which he classified, as I understand from your statement of the evidence, he classified *Healing vs. Jones* as a claims case?

Mr. Wiener: Yes, sir.

The Court: Now they contend it wasn't a claims case?

Mr. Wiener: That is correct.

The Court: Why the reversal?

Mr. Wiener: The allegations in our paragraph 10.

994 The Court: This is the one big point in the case?

Mr. Wiener: Yes, sir.

The Court: All right, let us proceed, but we will take a 15-minute recess.

Mr. McKevitt: Your Honor, I don't think that last answer was responsive, as to why the reversal.

The Court: Well, why do they contend now that it wasn't a claims case when at one time by approving Amendment No. 11 the Secretary did?

Maybe you have the answer somewhere.

I have to know these things, and when I interrupt the witness it doesn't indicate how I am thinking about this matter, but I am seeking information. I am sitting here now in the dual capacity of Judge and jury, and I wish we had a jury, so that I could pass on to the jury the responsibility of deciding the facts in the case.

Mr. McKevitt: Your Honor, I was just objecting to Mr. Wiener's response.

Mr. Wiener: May I make it more responsive to the question why? It was subterfuge, that was why.

The Court: I understand. You have used that word quite a bit, and I am sure I understand what you mean by it.

We will take a 15-minute recess.

(Thereupon, a short recess was had.)

The Deputy Clerk: Did you rule on Exhibit AO, Your Honor?

995 The Court: Yes, it is received.

By Mr. Wiener:

Q. Mr. Littell, will you look at page 95 of Plaintiff's Exhibit A. Do you see the second paragraph there? A. Yes, sir.

Q. In the covering letter from Mr. Udall to you, dated 22 December, 1961, transmitting approval of Amendment No. 9, he said: The Chairman of the Navajo Tribal Coun-

ernment, *Healing vs. Jones*, 174 Fed. Supp. 211. After extensive pretrial proceedings, the case was disposed of by a special three-judge Court. The exhaustive opinion of Circuit Judge Hamley occupied some 67 pages of the printed reports as he traced the history of the problems presented and explored the contentions of the respective Tribes with regard to the 1882 reservation. The interest of Congressman, later Secretary, Udall, was noted by Judge Hamley, 210 Fed. Supp. at 189.

It is reasonable to deduce that preparation and presentation of the case by respective counsel must have entailed great skill and professional attainments of a high

993 order. Substantial advantages were gained by the Navajo Tribe, *Healing vs. Jones*, 210 Fed. Supp. 125. The Supreme Court affirmed, 373 U. S. 758. The appellee was of counsel at all times, according to the official reports. That is the end of the footnote.

Then continuing with the text: Whether that action should have been classified as a claims case or considered part of the General Counsel's normal service seems to have been in question.

And then in a footnote under that is: By Amendment No. 11 to the Navajo Tribe attorney contract, the cases of *Healing vs. Jones* and *Navajo Tribe vs. State of Utah* had been added to the claims specified in 4 (b) of the 1957 contract. The amendment was approved for Secretary Udall as of July 26, 1962, by Assistant Secretary Carver.

The Court: Was that Amendment No. 11?

Mr. Wiener: That was Amendment No. 11.

The Court: And approved by the Secretary in which he classified, as I understand from your statement of the evidence, he classified *Healing vs. Jones* as a claims case?

Mr. Wiener: Yes, sir.

The Court: Now they contend it wasn't a claims case?

Mr. Wiener: That is correct.

The Court: Why the reversal?

Mr. Wiener: The allegations in our paragraph 10.

994 The Court: This is the one big point in the case?

Mr. Wiener: Yes, sir.

The Court: All right, let us proceed, but we will take a 15-minute recess.

Mr. McKevitt: Your Honor, I don't think that last answer was responsive, as to why the reversal.

The Court: Well, why do they contend now that it wasn't a claims case when at one time by approving Amendment No. 11 the Secretary did?

Maybe you have the answer somewhere.

I have to know these things, and when I interrupt the witness it doesn't indicate how I am thinking about this matter, but I am seeking information. I am sitting here now in the dual capacity of Judge and jury, and I wish we had a jury, so that I could pass on to the jury the responsibility of deciding the facts in the case.

Mr. McKevitt: Your Honor, I was just objecting to Mr. Wiener's response.

Mr. Wiener: May I make it more responsive to the question why? It was subterfuge, that was why.

The Court: I understand. You have used that word quite a bit, and I am sure I understand what you mean by it.

We will take a 15-minute recess.

(Thereupon, a short recess was had.)

The Deputy Clerk: Did you rule on Exhibit AO, Your Honor?

995 The Court: Yes, it is received.

By Mr. Wiener:

Q. Mr. Littell, will you look at page 95 of Plaintiff's Exhibit A. Do you see the second paragraph there? A. Yes, sir.

Q. In the covering letter from Mr. Udall to you, dated 22 December, 1961, transmitting approval of Amendment No. 9, he said: The Chairman of the Navajo Tribal Coun-

cil, by memorandum dated September 7th, has furnished information concerning the views of the Tribe with respect to proposed compensation increases and the addition of Mr. Walton as an attorney for the Tribe.

Do you see that? A. Yes, sir.

Mr. Wiener: Will you mark this, please, as Plaintiff's AP for identification?

(The document was marked Plaintiff's Exhibit AP for identification.)

By Mr. Wiener:

Q. I show you Plaintiff's AP for identification and ask you if that is the memorandum referred to in the sentence from the Secretary's letter that I have just read? A. Yes.

Mr. Wiener: I offer this in evidence, Your Honor.

The Court: Is there any objection?

996 Mr. McKevitt: No objection.

The Court: It is received.

(The document previously marked for identification as Plaintiff's Exhibit AP was received in evidence.)

Q. And in the next sentence of that same paragraph of the Secretary's letter, on page 95 of Plaintiff's Exhibit A, it says: Your memorandum of October 27th to the Solicitor contains further information in this regard.

Now, will you mark this?

(The document was marked Plaintiff's Exhibit AQ for identification.)

By Mr. Wiener:

Q. I show you Plaintiff's Exhibit AQ for identification and ask you if this is the memorandum referred to in the Secretary's letter? A. Yes, sir.

Mr. Wiener: I offer this in evidence, Your Honor.

Mr. McKevitt: May we have a second to look at it, Your Honor.

The Court: All right, take your time.

Mr. McKevitt: No objection, no objection to either of these.

The Court: All right, it is received.

(The document previously marked for identification as Plaintiff's Exhibit AQ was received in evidence.)

Mr. Wiener: Now, I have a question, Your Honor. I am about to move on to the Utah School Section cases, and Your Honor may recall that one day last week Mr. Pittle examined about that at some length, and I think with a question, tell me about it, invited and received a somewhat long recital, and then somewhere at the end of that explanation, Well, your own counsel can bring it out.

And my question is: Was it stricken from the record or what was testified to already in the record?

The Court: I don't recall, offhand.

Do you remember, Mr. Pittle?

Mr. Pittle: No, I don't.

The Court: I think I remember saying something about you can bring it out.

Now, do you think it is material?

Mr. Wiener: Yes. May I assume that what Mr. Littell testified to regarding the Utah School case is still in the record?

The Court: Yes, it is in the record.

Mr. Wiener: Very well.

By Mr. Wiener:

Q. Now, Mr. Littell, we are coming to the Utah School case.

998 Did that case or cases have a General Counsel phase? A. Yes, indeed.

Q. Did it also have a claims phase? A. Ultimately.

Q. Does it still have a claims phase in your opinion?

A. Yes, as to two sections.

Q. As to two sections? A. Yes, sir.

Q. Does it still have a General Counsel phase as to other sections. A. Oh, yes, indeed.

Mr. McKevitt: I object to this, Your Honor, as irrelevant. It had nothing to do with the claims case.

The Court: Very well.

Mr. Wiener: I beg your pardon. I beg Your Honor's pardon.

The Court: Let's see if we can get an agreement.

Mr. Wiener: Just a second, Your Honor, and I can find it in the record as one of the charges.

The Court: Do you withdraw the objection?

Mr. McKevitt: No, Your Honor, and I feel that this is irrelevant.

The Court: Well, as long as I indicated as I did, you may inquire.

Mr. Wiener: Very well, Your Honor.

999

By Mr. Wiener:

Q. In your opinion, is there any phase, any substituting phase of the Utah School Section cases still a General Counsel matter? A. Oh, yes, an overwhelming portion of it.

Q. Now, I would like you, Mr. Littell, as briefly and succinctly as possible to state the origin of the Utah School Section dispute, stating the respective contentions of the parties and the interests of the Navajos therein.

By Mr. Wiener:

Q. All right, suppose you begin. Do you need any map that we already have? A. I would appreciate it if you would put the maps up, the largest one you have of the Utah School Land Sections.

Mr. Wiener: Will you mark this for identification, please?

(The document was marked Plaintiff's Exhibit AR for identification.)

By Mr. Wiener:

Q. Now, Mr. Littell, addressing yourself to Plaintiff's Exhibit AR for identification—

Mr. McKevitt: Hasn't that been admitted?

The Court: Have you offered it in evidence?

1000 Mr. Wiener: Didn't we have this one before?

The Court: Is this the same one?

Mr. Wiener: Will you strike that out? It is the same as AA in evidence.

By Mr. Wiener:

Q. Strike out the last question and say, addressing yourself to Exhibit AR for identification, which it is agreed is the same as Exhibit AA in evidence, will you on that exhibit, being mindful of His Honor's admonition to be brief and succinct, explain the genesis of the Utah School Section case, having in mind that the areas marked E, H, F and S are the only ones in the State of Utah? A. Also E-1.

Q. Also E-1, which is in the State of Utah. A. There are between 90 and 93 and 94 School Land Sections or potential School Land Sections on the reservation Nobody knows exactly at this moment.

Q. Where is the reservation line? A. The reservation line is south of the San Juan River, except for these added pieces of the McCracken Mesa Area, added by the McCracken Mesa Act of 1958, and H, I want to be sure, and H, the addition to the Navajo Reservation by the Executive Order of 1905, and this E was added by 1805, and 1884.

Q. Are all the areas E-1, E, H and S all part of
1001 the Navajo Reservation in the State of Utah? A.
They are all part of the Navajo Reservation in Utah.

Now, as simply as I can summarize it, pursuant to the Court's instructions when we faced this problem in 1947,

nobody was very much aware of it as to the status of the School Land Section.

Everything I say is too brief, but I will try it anyway.

After the discovery of oil in large quantities in December, 1956, these areas over her became of great importance. The so-called Peyot strip E added by the 1884 Executive Order is of no great importance, except you can see in the shaded areas that there are a lot of lurking School Land problems there, those shaded areas with the exception of some cross marked potential or actual School Land Sections.

Now, before you put up the other map, this presented one of the greatest title problems in the West, the status of the so-called relinquished School Land Section, because Utah in order to get their School Land rights out of this arid and unproductive area of the Navajo Reservation, had exchanged a lot of the School Land Sections for rights to School Land Sections.

But as soon as oil was discovered, they changed their minds and sought to attack the legality of those exchanges on the ground of the 1919 Utah Act, which forbade 1002 the transfer from the State of mineral lands.

At any time you want a concrete summary of this problem, by letter of November 29th, 1959, which is either in the Joint Exhibit, or in the documents put in by the Government, summarizes it, because we had the problem, and also add my letter of July 7th, 1958, which is in the documents submitted by the Government, of which they secured some at Window Rock, which is the letter to Joseph S. McPherson, laying out what I consider to be the strategy of handling the School Land Sections problem, plus the river bed land of the San Juan, which were also in dispute with the State of Utah. And this discovery of oil, of course, made this a problem.

The essence of it is, without going into detail as the Court has suggested, that the strategy suggested in my letter of July 7th was followed, in an action by the Gov-

ernment to quiet title, by an action against the State of Utah to all the School Land Sections of Utah, and we asked them, the Department of Justice, to bring an action against Utah to quiet title to two sections, the reason therefor being set forth in my letter of July 7, 1958.

We could not sue on behalf of the Tribe the State of Utah because of sovereign immunity, it had to be through the Department of Justice, but we did organize that suit, and with all respect to the able lawyers over there, we did the basic work on that case and quieted title to two 1003 so-called relinquished School Land Section cases.

Q. Where were those two sections located? A. Will you put up that section of the map?

Mr. Wiener: May this map be marked Plaintiff's Exhibit AS for identification?

(The document was marked Plaintiff's Exhibit AS for identification.)

Q. Am I correct in assuming that this is simply an enlargement of the similarly labeled area on the larger map? A. Exactly. That is right.

Before I comment on this map, I forgot to point out, that this blue line running through north and south to Area E is Chimney Creek, and is related to the Utah School Land Sections problem, and was a problem of title, and the river bed lands of the San Juan from the junction of Chimney Creek down to the borderline of Colorado, and these two problems were handled practically simultaneously. Because of the shifting location of the river bed, you could not determine whether it was the Navajo Reservation or the State of Utah, and that is a little bit involved, and again without detail, in a very un-lawyer-like statement, but that case was precipitated at the same time, and in fact, we drafted the original complaint and the briefs, and helped prepare the evidence, and it was very successfully handled to a conclusion with the result that 1004 the Tribe had a couple of million dollars in impounded funds, and settled title to that land.

Mr. McKevitt: Was that the Department of Justice?

The Witness: The same situation. We could not sue Utah because of sovereign immunity. You could not sue on behalf of the Tribe.

By Mr. Wiener:

Q. Now, turning to Exhibit AS for identification, can you locate the two School Land Sections which you mentioned in your earlier testimony? A. No, sir, it is not important.

It is two sections, anywhere they are located is not important, because the sole question was whether that State law of 1919 invalidated the prior exchanges, and we helped to beat the State case before the Supreme Court of Utah, and this case in the Federal Court against the State of Utah, with the Department of Justice, all the way through the Court of Appeals, so that the principle was settled as to this category of School Land Sections, and the relinquished parts, that was settled.

Q. Now, after AS for identification was posted, you mentioned recoveries, further recoveries by the Department of Justice which enured to the benefit of the Navjo Tribe.

I would like you to locate those tracts. Were those school lands also or were those others. A. 1005 What you see on N and H and a portion of E is one of our work maps in progress. Only by way of illustration, these lines here give the name of settlers and people that occupied this area along the San Juan River, and the red dots on those various sections indicate and most unfortunately reveal the status of our proof for our client on the School Land Section cases. Two emerged as what we consider to be claims cases on the theory that has been untried to date, whether a School Land Section may be claimed by the State when it is occupied by Indians.

School Land Sections must be on vacant, unoccupied, public, and unappropriated public domain, and we con-

tend that these two sections, which are the Shell Carter Section, and this one.

Q. Are those the ones that look like a case of measles?

A. That is right. They have the red dots in the big areas, and all these colored sections are School Land Sections in different categories, according to the legend, and there are some power sites and other things that are not material here, but this is one of our work maps, and pursuant to the Court's instruction, I will avoid as far as I can all that immaterial data or discussion.

But these two cases emerged in that Utah leased those sections to oil companies, the Shell-Carter Oil Companies, respectively, and applying for patents, we, the 1006 Navajo Tribe, were denied by the United States Government any right of claim or access to those lands, and speaking again in non-lawyer-like language to make it as simple as possible.

Q. When was the application for patent by the Navajo Tribe in relation to the success of the United States in this litigation against the State of Utah? A. I have it in my notes. I think it was—

Q. Well, was it before or after? A. Sir?

Q. Was it before or after? You testified that the United States won its case against the State of Utah in two school sections? A. Yes.

Q. You also testified that the Tribe made application for patent to two school sections? A. No, Utah made application for patent, and these are not relinquished sections. That is the difficulty of simplicity. These are unrelinquished sections.

By The Court:

Q. What do you mean? I would like to get familiar if I can with these terms. What do you mean by an application for patent? Is that what you said? A. Yes, sir.

1007 State has to apply for a patent to these School

Q. What do you mean by that? A. Well, sir, the

State has to apply for a patent to these School
 1007 Land Sections, it doesn't receive it automatically,
 to Section 2, 16, 32 ad 36, in every township, where
 there would be School Land Sections, that invests in the
 State, subject to application for a school land patent,
 at whichever date comes last between the survey and the
 admission to the Union of the United States as a State.
 And whichever of these dates is latest, again by over-
 simplification, is roughly the time the school land grant
 becomes eligible and the State applies for a patent.

And in this case they applied, and the Tribe was for-
 bidden the right to intervene and contest this on this legal
 theory that the lands were occupied by Indians, and there-
 fore they were not vacant, unappropriated public domain.

By Mr. Wiener:

Q. Now, what phase or have you described any phase
 of the Utah School Section dispute which under your
 classification is a claims case as far as the Indians are
 concerned? A. Only these two. They are pending on appeal
 to the Secretary of the Interior.

Q. Are they pending? A. On the refusal of the Bureau
 of Land Management to allow the Tribe to intervene, in
 other words, denial of the Tribe's claim of access to these
 lands. The whole mass of School Land Sections so far as
 General Counsel.

Q. And those two that are there, how many sec-
 1008 tions are involved? A. Two.

Q. Two. A. Yes. Those big sections with what
 you called the measles dots on them.

Q. And the Bureau of Land Management Docket No.
 030009, to what does that apply? A. That applies to those
 two sections.

Q. And does that also include the application by the
 State of Utah? A. That is an appeal from the State, that
 is Utah's application for the patent, and this is the num-
 ber of the case on appeal to the Secretary of the Interior.

Q. Now, in the directions that Mr. Zimmerman gave Auditor Boyd in connection with separating out all entries from attorneys worksheets that said Utah School Section, does that indicate to you whether it is work on the General Counsel factors you have described or work on the claims factors? A. Of course not.

Mr. McKevitt: I object to that, that is a matter of argument.

The Court: Well, isn't this a matter of interpretation?

Mr. Wiener: Well, the point is, Your Honor, that under the directions Mr. Boyd received every time there 1009 was a mention of a Utah School case, he put it down as a claims case.

The Court: Refresh my recollection on that, who is he?

Mr. Wiener: Mr. Boyd was the auditor from the Bureau of Indian Affairs.

The Court: I remember now.

Mr. Wiener: And he was asked to produce his tabulations, which were Defendant's Exhibits 1 to 13, and his classification of the worksheets, which in turn were Defendant's 4 to 8, an objection was made on the ground that Utah School Sections did not necessarily mean a claims case. Now, I am endeavoring to adduce through this witness, to ask this witness whether in view of the divided nature of the Utah School Section controversy, he can tell whether the simple notation, Utah School Section, means working on the claims aspect or working on the General Counsel aspect.

The Court: Well, if he knows.

By Mr. Wiener:

Q. Do you know? A. Well, yes, I can this much on that point. When it is put down as Utah 030009, then it involves those two sections but all the other references, which are the overwhelming majority, perhaps 98 or 99 per cent are General Counsel work on the general School Land Sections.

The Court: Let me ask you a question, Mr. Wiener. Have you gentlemen had an opportunity, since Defendant's Exhibits 4, 5, 6, 7, and 8 were identified, which I think are records that Mr. Boyd identified, to look through them?

Mr. Wiener: We looked through them before the trial, Your Honor.

The Court: Do you know what they are?

Mr. Wiener: We know what they are.

Mr. Pittle: They were deliver at pretrial.

Mr. Doyle: And that was, of course, the sense of the objection to them, Your Honor, in that the tabulation he put down meant nothing, since simply any time Utah School Section was mentioned, he put it down, whether it had the case number on it or not.

The Court: Well, I suppose you will mention that in your findings of fact. You will summarize the exhibits.

Mr. Wiener: Yes, sir.

By Mr. Wiener:

Q. What benefits were obtained, what monetary benefits were obtained by the Navajo Tribe of Indians in consequence of your General Counsel work on Utah School Sections? A. No one can estimate the millions of dollars that were saved to the Tribe by reason of the adjudication of the class of School Land Sections I am telling you about.

Q. Now, turn to page 103 of the joint appendix, Plaintiff's Exhibit A— A. Could I complete that answer to that question?

Q. If you haven't completed it, please do, sir.

Mr. McKevitt: Your Honor, I must object to this as being absolutely irrelevant to the issues in this case. It is merely self-serving.

The Court: What was the question?

Mr. Wiener: The question was: What benefits enured to the Tribe as the result of the General Counsel work?

The Court: This is his opinion of what was done.

Mr. Wiener: Certainly, Your Honor.

By Mr. Wiener:

Q. In your opinion, what benefits enured to the Tribe as a consequence of your General Counsel work, not your claims work, your General Counsel work in the Utah School sections controversy? A. First, the bare legal confirmation of the fact that Utah had lost those sections in exchange and could not invalidate those exchange on the grounds of the 1919 Utah Act forbidding the sale or transfer of mineral resources.

This did not give them to the Navajo Tribe. That is why, counsel, I asked if I could complete it.

Q. Yes. A. They were secured to the Navajo Tribe actually by an amendment which I secured to the McCracken Mesa Exchange Act, by which the Tribe acquired that small northernmost area, under-1012 neath there, of 53,000 acres.

Marked S? A. Marked S, and it doesn't show on this large scale map, in 1958, in which the Government exchanged with the Navajo Tribe this 53,000 acres for the 53,000 acres, which are down at the bottom of the page, on which is now located the Grand Canyon Dam, but the important thing about that Act, and the great thing, was that it confirmed title in the Navajo Tribe by Act of Congress for the first time, to these Executive Order areas, or all the areas I pointed out to you there, except the Aneth Extension, and the Aneth Extension Act area, but E, the Executive Order of 1884 and 1905 were at last confirmed to the Navajo Tribe, and title does not vest until Congress does this, and that swept into the Navajo Reservation all these miscellaneous cats and dogs of title, of mining claims, and the homestead settlements and any of these vacant relinquished sections, which were quite numerous, and as I remember, there were 15 in that area, but I cannot swear to this.

That confirmed into the Navajos as a matter of title, but up to that time they had the use merely by just using it.

Mr. McKevitt: I object to this, Your Honor. We are getting into something else. He is being paid \$35,000 a

year as General Counsel, and it is presumed he had some results for it. I don't see where it has anything to do with this lawsuit.

1013-1055 The Court: Well, I suppose he is trying to show what a good job he did.

Mr. Weiner: Sure, has done a good job.

Mr. McKevitt: And he had other lawyers to help him, too.

The Court: Well, everything is in the record. All right, let us proceed.

By Mr. Wiener:

Q. Turn to page 103 of Plaintiff's Exhibit A, Mr. Littell, paragraph 3 C, and that is the one that adds two claims cases, one is Healing vs. Jones, which we have discussed at some length, and the other is the Navajo Tribe of Indians vs. the State of Utah before the Secretary of the Interior, No. Utah 030009.

Is that the claims aspect of the Utah School Lands controversy that we have been discussing this afternoon?
A. Yes.

The Court: All right, we will adjourn now until 10 o'clock tomorrow morning.

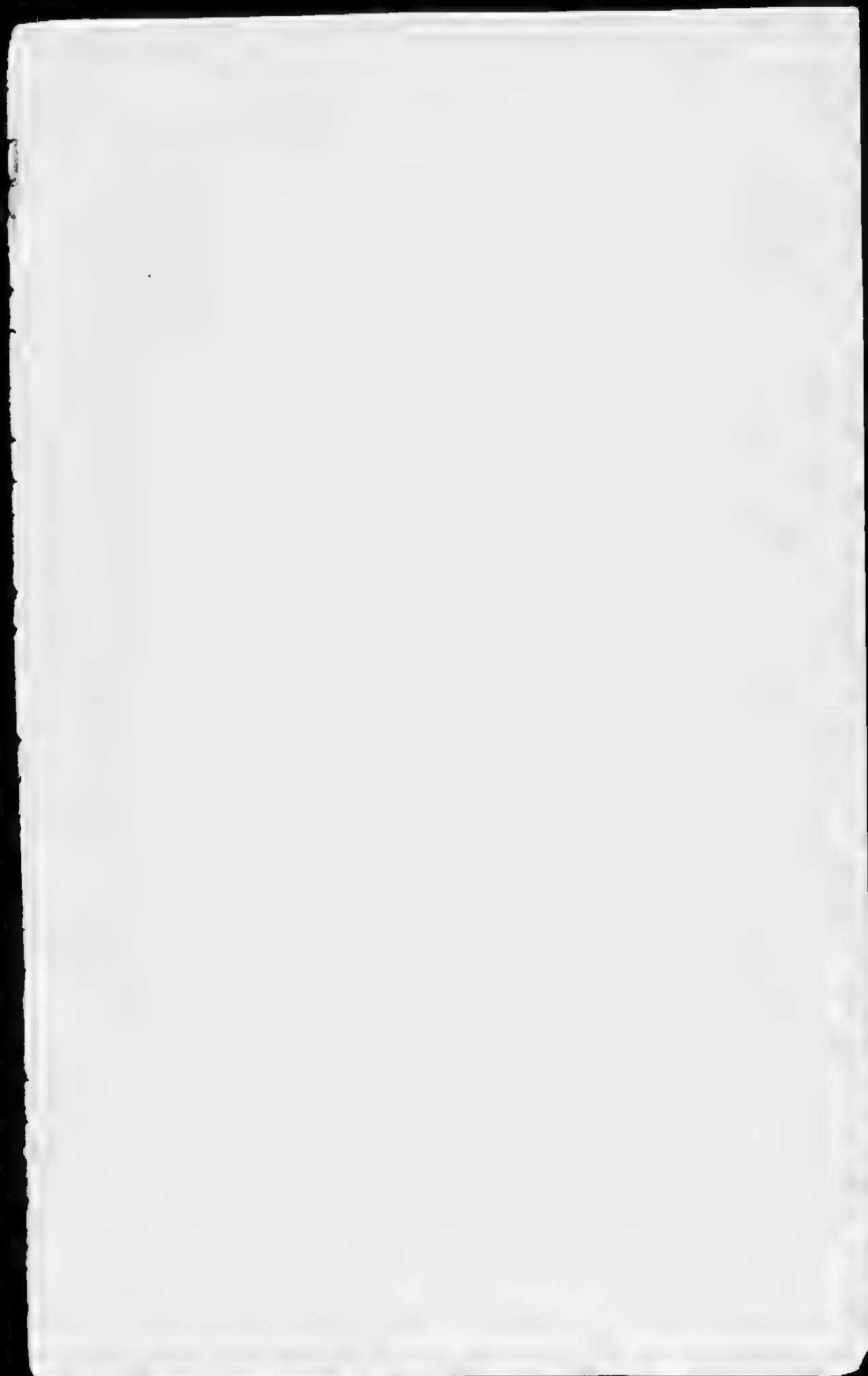
(Thereupon, at 3:45 o'clock p.m., an adjournment was taken until 10:00 clock a.m. on Tuesday, February 9, 1965.)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CERTIFICATE OF OFFICIAL COURT REPORTER

I, ERNEST MARKWALTER, official court reporter for THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, do certify that the foregoing is the official transcript of the testimony adduced and proceedings had in said Court in Littell vs. Udall, Civil Action No. 2779-63, on Feb. 8, 1965.

/s/ ERNEST MARKWALTER
Official Court Reporter



SUPPLEMENTAL JOINT APPENDIX

United States Court of Appeals
for the District of Columbia Circuit

FILED APR 15 1966

IN THE

Nathan J. Paulson
CLERK

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,725

STEWART L. UDALL, Secretary of the Interior, *Appellant*

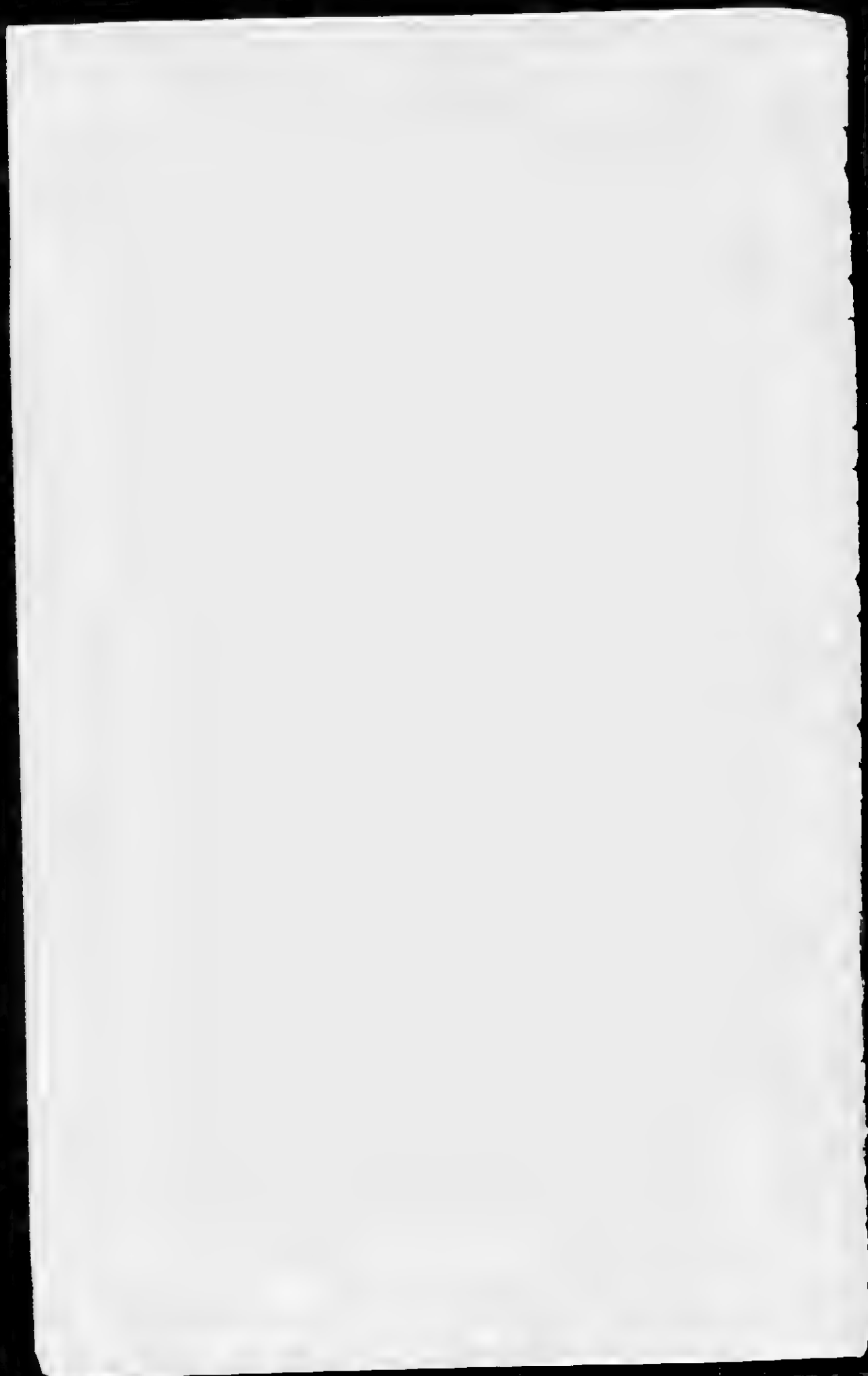
v.

NORMAN M. LITTELL, *Appellee*

Appeal From the United States District Court
for the District of Columbia

(Pages 2689-2701)





INDEX

	Page
Topical Table of Contents of Joint Appendix:	
A. Preliminary Injunction Proceeding	2689
B. First Appeal	2690
C. Contempt Proceeding	2690
D. Clarification Motion	2691
E. Trial	2691
F. Second Appeal	2692
Corrections and Omissions:	
Plaintiff's Contempt Exhibit 15	2693
Plaintiff's Exhibit BI	2699
Plaintiff's Exhibit BJ	2701



IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,725

STEWART L. UDALL, Secretary of the Interior, *Appellant*

v.

NORMAN M. LITTELL, *Appellee*

**Appeal From the United States District Court
for the District of Columbia**

SUPPLEMENTAL JOINT APPENDIX

Topical Table of Contents of Joint Appendix.

To aid location of references, the following table is submitted:

Topical Table of Contents of Joint Appendix

A. Preliminary Injunction Proceeding

Complaint—I JA 2-9

Motion for Preliminary Injunction with Supporting

Affidavits—I JA 9-246, 326-344

1947 Contract—I JA 22-28

1957 Contract with Amendments 1-11 and Supporting Papers—I JA 29-142
 Amendment 12—V JA 2140-2147
 Amendment 13 (never approved or disapproved)—V JA 2234-2240
 Termination Documents with October and November Memoranda—I JA 208-241
 Affidavits in Opposition to Motion for Preliminary Injunction with Exhibits—I JA 247-325
 Preliminary Injunction with Findings of Fact, &c.—I JA 345-350

B. First Appeal

Opinion and Judgment of U. S. Court of Appeals, affirming—I JA 351-362
 Petition for Rehearing and Order denying—I JA 362-367

C. Contempt Proceeding

Motion for Order Adjudicating Defendant, &c., in Contempt, with Supporting Affidavits—I JA 367-400
 Affidavits &c in Opposition—I JA 401-440
 Transcript of Trial of Contempt Motion—I JA 441-511; II JA 512-521; II JA 718-1023
 Contempt Trial Depositions—II JA 522-716
 Contempt Trial Exhibits:
 Pl. Ex. 12—not printed
 Pl. Ex. 13-14—V JA 2560-2571
 Pl. Ex. 15—Supp. JA 2693-2698
 Pl. Ex. 16—not printed
 Pl. Ex. 17—V JA 2571-2572
 Pl. Ex. 18—not printed
 Pl. Ex. 19-22—V JA 2573-2588
 Def. Ex. 1 and 2—not printed
 Amendment to Contempt Motion to Conform to Proof—III JA 1024-1027
 Opinion on Contempt Motion—V JA 2629-2642b

Order on Contempt Motion—V JA 2396-2397

Note: The draft order at III JA 1027-1028 was presented but not signed.

D. Clarification Motion

Defendant's Motion to Clarify Injunction—III JA 1031-1033

Documents in Support and Opposition—III JA 1034-1045, 1066-1071

Plaintiff's Clarification Exhibits:

Pl. Ex. 1-3—not printed

Pl. Ex. 4-12—III JA 1046-1065

Pl. Ex. 13-14—[not printed]

Pl. Ex. 15—not printed

Order denying Motion for Clarification—III JA 1072

E. Trial

Defendant's answer—III JA 1028-1030

Trial Transcript—III JA 1073-1574, IV JA 1575-1888

Pl. Ex. A—1st 345 pages of JA on first appeal, now in I JA through p. 344

Pl. Ex. B-J—IV JA 2014-2061

Pl. Ex. K-R—V JA 2062-2151

Pl. Ex. T-W—V JA 2152-2234

Pl. Ex. Y—V JA 2234-2240

Pl. Ex. Z and AA—not printed

Pl. Ex. AB-AQ—V JA 2241-2353

Pl. Ex. AS—not printed

Pl. Ex. AT-AZ—V JA 2353-2360

Pl. Ex. AZ-2—V JA 2360-2367

Pl. Ex. BC-BH—V JA 2368-2457

Pl. Ex. BI—V JA 2458-2459 and Supp. JA 2699

Pl. Ex. BJ—V JA 2459-2460 and Supp. JA 2700

Pl. Ex. BK-BO—V JA 2461-2465

Pl. Ex. BQ-BV—V JA 2466-2559

Def. Ex. 1-3—IV JA 1889-1899
 Def. Ex. 4-18—not printed
 Def. Ex. 19-20—IV JA 1899-1973
 Def. Ex. 21—not printed
 Def. Ex. 22-25—IV JA 1974-1983
 Def. Ex. 26-28—not printed
 Def. Ex. 29-32—IV JA 1894-2012
 Def. Ex. 33-34—not printed
 Def. Ex. 35 for *id.*—IV JA 2012-2013
 McPherson Interrogatories—V JA 2588-2609

Opinion, Sirica, D.J.—V JA 2610-2629

Appendix I to above, contempt opinion—V JA 2629-2642b

Findings of Fact—V JA 2643-2675

Conclusions of Law—V JA 2675-2679

Permanent Injunction—V JA 2683-2687

F. Second Appeal

Notice of Appeal—V JA 2680

Statement of Points—V JA 2681-2683

Corrections and Omissions

Plaintiff's Clarification Exhibits 1-3 (JA 1045) and 13-15 (JA 1066) need not be printed.

Plaintiff's Contempt Exhibit 15, inadvertently omitted (see JA 748), follows:

(Plaintiff's Exhibit 15)

AGENDA OF THE NAVAJO TRIBAL COUNCIL

(As Revised on February 4, 1964)

January 27-February 12, 1964

PRESIDING: Raymond Nakai, Chairman, Navajo Tribal Council; Nelson Damon, Vice Chairman, Navajo Tribal Council

PLACE: Navajo Tribal Council Chambers, Window Rock, Arizona

1. *Presentation concerning the urgent request for the Public Works Program will be made to the Navajo Tribal Council.*

2. *Amending the 1964 Fiscal Year Budget by the Appropriation of Funds for the Annual Audit.*

A proposed resolution will be presented to the Navajo Tribal Council for the purpose of amending the Department of Controller's 1964 Fiscal Year Budget by appropriating \$15,000.00 for costs incurred for the annual audit.

3. *Amending the Fiscal Year 1964 Budget by the Appropriation of Funds for Tolani Lake Water Line Construction.*

There will be presented to the Navajo Tribal Council a proposed resolution of the Tribal Council for adoption that would amend the Fiscal Year 1964 Budget by appropriating \$22,000.00 for the purpose of constructing the revised Tolani Lake Water Line Construction Project.

4. *Presentation for Purposes of Reviewing the Navajo Tribal Livestock Adjustment Program.*

Special prepared brochure and other information will be presented to the Navajo Tribal Council for the purpose of studying and reviewing the Three-year Livestock Adjustment and Range Improvement Plan for the Navajo Reservation pursuant to Memorandum of Understanding as to the Navajo Tribe.

5. Consideration of the Many Farms Packing Plant Corporation Proposal to the Navajo Tribe.

Presentation will be made to the Navajo Tribal Council by the Many Farms Packing Plant Corporation of Many Farms, Arizona, concerning that corporation's proposal to the Navajo Tribe.

6. Report of the Navajo-Hopi Negotiating Committee.

For the information of the Navajo Tribal Council and for further action, a report will be made by the Committee concerned with the Navajo-Hopi negotiations.

7. Amending the 1964 Fiscal Year Budget by the Appropriation of Funds for the Boy Scouts.

There will be presented to the Tribal Council for its consideration a proposal by resolution to amend 1964 Fiscal Year Tribal Budget by the appropriation of \$4,560.00 to defray the expenses of sending 24 Navajo Boy Scouts to the National Jamboree at Valley Forge, Pennsylvania, in 1964.

8. Reviewing and Proposing to Amend the Present Navajo Irrigation Project Legislation.

Presentations will be made to the Navajo Tribal Council for purposes of reviewing the Navajo Irrigation Project and to consider a resolution that proposes to amend the present Navajo Irrigation Project legislation.

9. Progress Report Concerning Aneth Economic Development Program.

The Resources Committee of the Navajo Tribal Council will present to the Navajo Tribal Council a progress report of the Aneth Long Range Economic Development Program.

10. Adopting a Navajo Tribal Economic Development Policy Concerning Private Capital Investment on Navajo Tribal Lands.

There will be presented to the Navajo Tribal Council a proposed resolution for adoption that would set forth a policy governing investments by private capital in the undertaking of economic developments on the Navajo Reservation.

11. *Adopting Traffic Code for those Portions of the Navajo Reservation Lying within the State of Arizona.*

A proposed traffic code and a covering resolution will be presented to the Navajo Tribal Council for adoption and the said code will be for use on portions of the Navajo Reservation lying within the State of Arizona.

12. *Presentation of the Fiscal Year 1963 Financial Statement and Report to the Navajo Tribal Council.*

For the information of the Navajo Tribal Council, its review, and the preparation for a new budget, the Fiscal Year 1963 financial statement and report will be made by the Controller of the Navajo Tribe.

13. *Authorizing Construction of Police and Judicial Facilities at Window Rock, Arizona.*

A proposed resolution will be considered by the Navajo Tribal Council that would provide for authorizing the construction of police and judicial facilities at Window Rock, Arizona, by Force Account with available funds in the Fiscal Year 1964 Navajo Tribal Budget.

14. *Approving and Ratifying Fiscal Year 1963 Budget Over-expenditures.*

A proposed resolution of the Navajo Tribal Council will be presented to the Tribal Council for adoption that would amend the 1964 Fiscal Year Budget or authorize the necessary appropriations of funds to clear the over-expenditures in the 1963 Fiscal Year Budget.

15. *Appropriating Funds as an Amendment to Fiscal Year 1964 Budget for the Purchase of Kimbeto Trading Post Lands.*

A proposed resolution will be considered by the Navajo Tribal Council for the purpose of amending the Fiscal

Year 1964 Budget by appropriating \$16,000.00 to be used to purchase 640 acres of deeded land known as the Kimbeto Trading Post and to defray the closing costs of the purchase.

16. *Amending the Church Rock-Two Wells Land Adjustment Legislation.*

Presentations will be made to the Navajo Tribal Council for the purpose of adopting a resolution that would propose to amend the Church Rock-Two Wells Land Adjustment Legislation by including 160,000 acres of additional lands.

17. *Authorizing and Requesting the Construction of a Warehouse at Pinon, Arizona.*

There will be presented to the Navajo Tribal Council for its consideration a proposal as follows: Authorizing Construction of a Warehouse at Pinon, Arizona, to Proceed and to Request the Hopi Tribal Council to also Authorize this Construction with the Understanding that such Construction shall not Prejudice the Rights of either Tribe.

18. *Adopting Boat and Water Sports Code of the Navajo Tribe (Arizona).*

Proposals and a covering resolution will be presented to the Navajo Tribal Council for the purpose of adopting Tribal Boat and Water Sports Code of the Navajo Tribe of Waters of the Navajo Indian Reservation in the State of Arizona.

19. *Approving the Transfer of Funds for the Tribe's Participation in the Construction of Water and Sewage Facilities.*

A proposed resolution of the Navajo Tribal Council will be presented to the Tribal Council for the purpose of approving the transfer of funds for Capital Additions Account for the Tribe's participation in the proposed con-

struction of water and sewage facilities at Many Farms, Arizona.

20. *Adopting Boat and Water Sports Code of the Navajo Tribe (New Mexico).*

Proposals and a covering resolution will be presented to the Navajo Tribal Council for the purpose of adopting Tribal Boat and Water Sports Code of the Navajo Tribe of Waters of the Navajo Indian Reservation in the State of New Mexico.

21. *Confirming the Appointment of a Trial Judge to fill the Vacancy in the Judicial Branch of the Navajo Tribe.*

22. *Report of Glenn R. Landbloom, General Superintendent, Navajo Agency.*

23. *Approving Certain Requirements for Members of the Central Loan Committee of the Navajo Tribal Council.*

A proposed resolution will be presented to the Navajo Tribal Council for the purpose of approving the amendment of the Plan of Operation, Navajo Revolving Credit Program, to include conditions and regulations for membership in the Central Loan Committee.

24. *Report of the Tribal Council Legislative Committees, Commissions, and Others.*

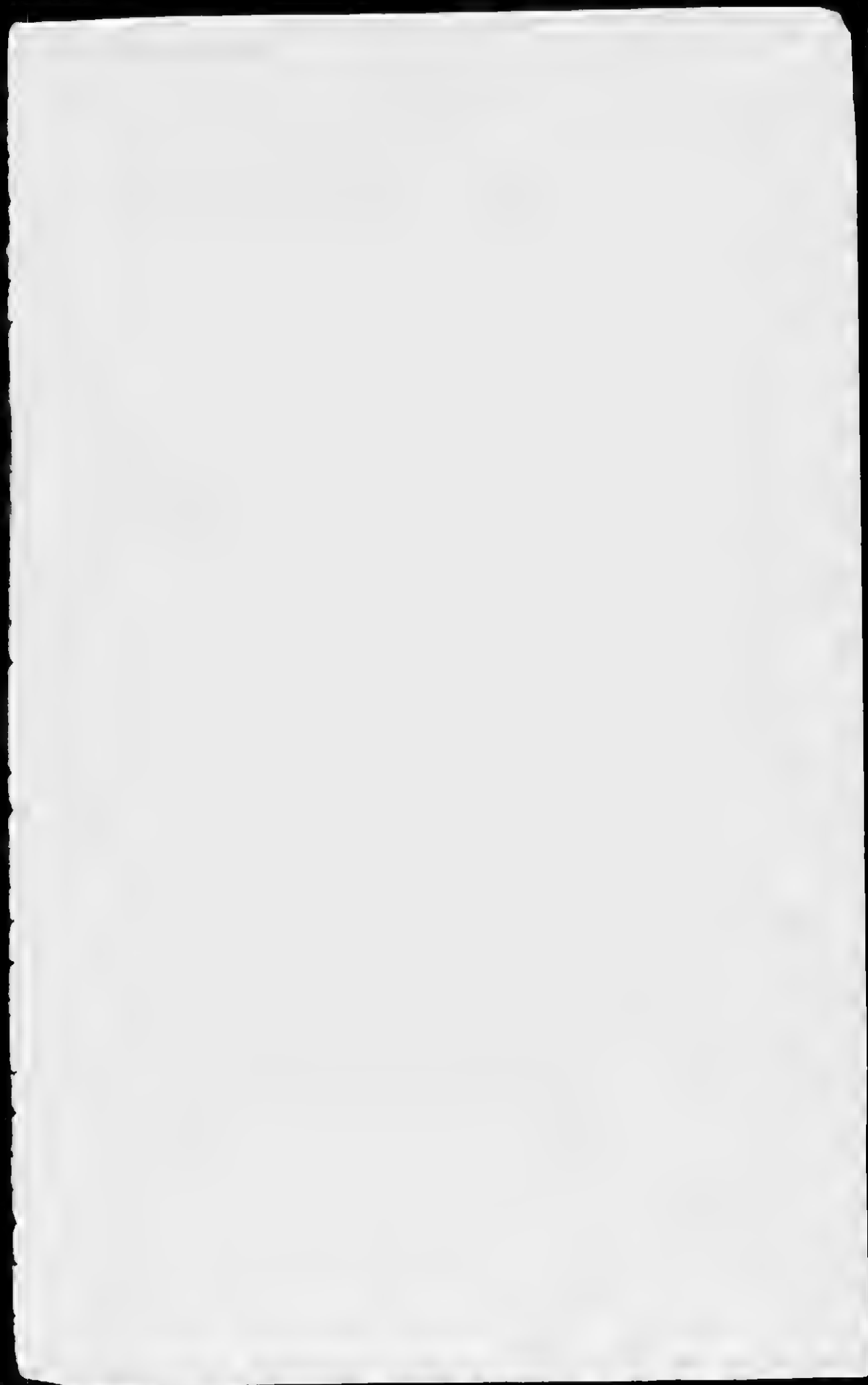
Groups having reports are requested to furnish written reports and these can be made any time during the current session of the Tribal Council.

- (1) Navajo Housing Authority
- (2) Navajo Tribal Utility Authority
- (3) Judicial Committee
- (4) Committee on Alcoholism
- (5) Health Committee
- (6) Police Committee

- (7) Trading Committee
- (8) Welfare Committee
- (9) Placement and Relocation Committee
- (10) Loan Committee
- (11) Education Committee
- (12) Resources Committee
- (13) Management Methods and Procedures
- (14) Navajo Parks Commission
- (15) Navajo Forest Products Industries

25. *Miscellaneous Items:*

- (1) Authorizing the Expenditure of Funds from Chapter House Account for Equipment and Ground Improvement, Crystal Chapter House.
- (2) Amending the Fiscal Year 1964 Budget by Appropriating \$100,000.00 to Defray the Expenses of Exhibiting and Sale of Indian Wares at the New York World's Fair, scheduled to open on April 22, 1964.
- (3) Re-evaluating the Office of the Executive Secretary and Assigning the Duties of the said Office to other Tribal Officials or Departments.
- (4) Re-evaluation of the Handling of Legal Affairs of the Navajo Tribe by the Tribal Legal Department and Authorization to the Chairman to take whatever action, if any, he may deem appropriate with respect thereto.





FILED

AK 1 5 1956

FILE COPY
Sol. Surname:
C-61-1120.9a

Swygert	12-14
Barnes	12-14
Waller	12/14
Fisher	1/22

Dear Mr. Little - ROBERT M. STEWART, CLERK

There has been submitted to this office for approval a proposed Amendment No. 9 to your general contract with the Navajo Tribe of Indians.

This proposed amendment would increase the salaries of Joseph F. McPherson, Walter F. Wolf, Jr., Richard R. Drennon and you. It also would add Robert J. Walton as one of the contract attorneys. Although the proposed amendment has been circulated, among others, by James J. McCough, Richard R. Drennon and John J. Deharby as parties to the contract, your letter of December 12, 1961, advises that these three attorneys terminated their services effective August 31, 1961. This letter also states C. Lawrence Huerta and Charles J. Alexander have resigned as tribal attorneys respectively effective July 16 and 31, 1961. We therefore consider Charles J. Alexander, C. Lawrence Huerta, James J. McCough, John J. Deharby and Richard R. Drennon as being no longer employed by the Navajo Tribe and their services under the contract with the Navajo Tribe have been terminated effective as of the dates stated herein.

The Chairman of the Navajo Tribe, Mr. John F. Foy, has furnished information regarding the views of the tribe with respect to the proposed addition of Mr. Dalton as an associate member of the tribe. Your memorandum of October 27 to the Solicitor General is being reviewed. Further information in this regard.

The proposed Amendment No. 3 to the general contract with the Navajo Tribe is approved. The original and five copies of the approved amendment are being forwarded to the Director of Indian Affairs for distribution to the Area Office, Superintendent of the Navajo Agency, and the Navajo Tribe. Eleven copies are enclosed for distribution by you to the interested attorneys.

Sincerely yours,

(sgd) Stewart L. Udall

Secretary of the Interior

Norman M. Littell, Esquire
1825 Jefferson Place, N. W.
Washington 6, D. C.

Enclosures

COPY FOR THE SECRETARY'S OFFICE

Plaintiff's Exhibit BI (JA 2458-2459; see JA 1758) is as follows:

2699

DEC 1 1963

cc: BIA (2) Tribal Programs with original and two copies of amendment
 Acting Reg. Sol., Denver
 Assist. Sec. Carver
 Sec. Reading File
 Sec. Files
 Sol. Files
 Assist. Sol. N&L
 Assoc. Sol. IA
 Mr. Dwight (2)
 JEDwight:db

BEST COPY AVAILABLE
from the original bound volume

2701

The document at JA 716-717 has no relevancy to the present case.

The order at JA 1027-1028 is a draft, not signed. The actual order is at JA 2396-2397.



BRIEF FOR STEWART L. UDALL,
SECRETARY OF THE INTERIOR, APPELLANT

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,725

STEWART L. UDALL, Secretary of the Interior, APPELLANT

v.

NORMAN M. LITTELL, APPELLEE

Appeal from the United States District Court
for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED MAR 7 1966

Nathan J. Paulson
CLERK

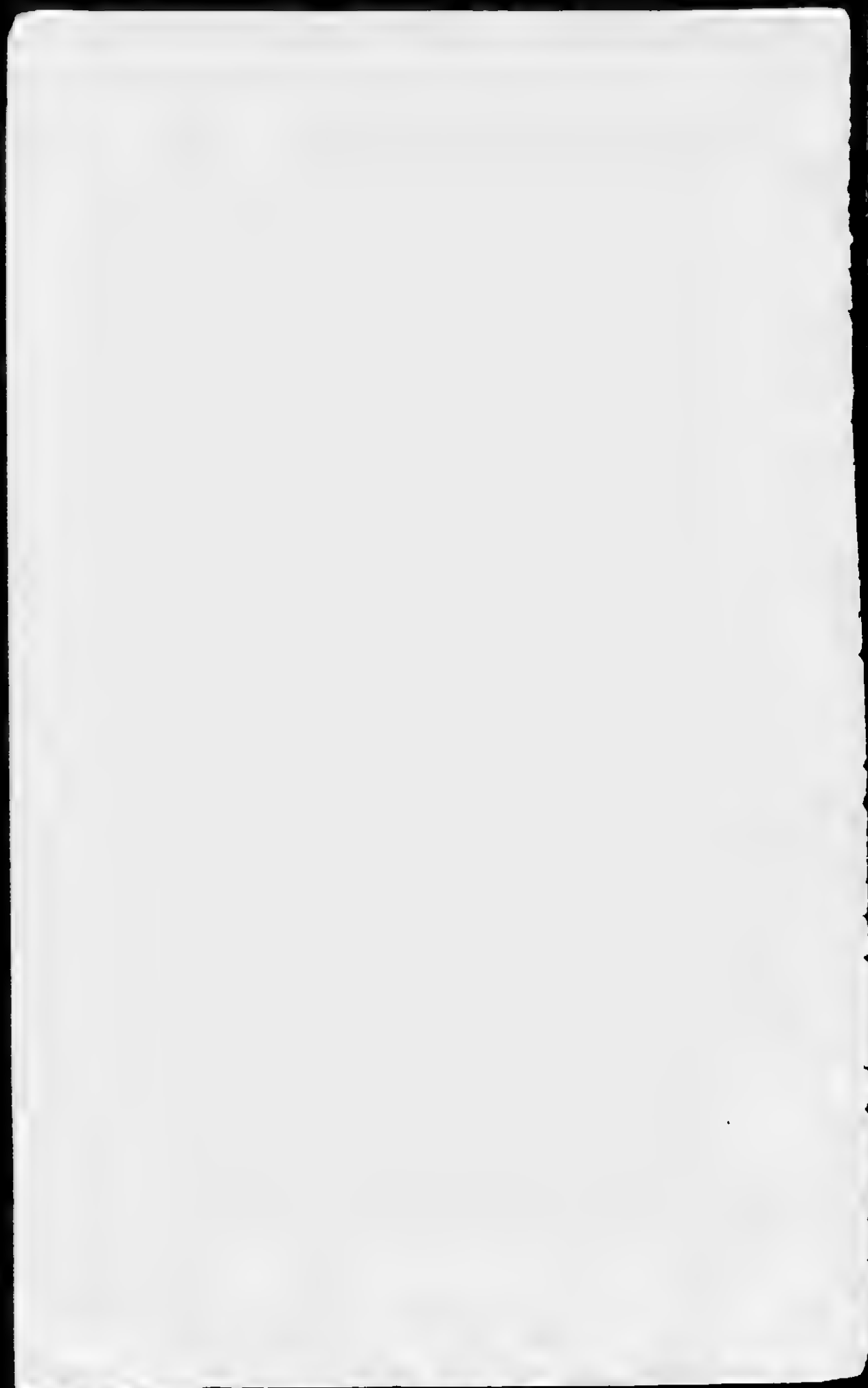
EDWIN L. WEISL, JR., *NO*
Assistant Attorney General.

ROGER P. MARQUIS, *OK*

HERBERT PITTLE, *OK*

THOS. L. McKEVITT, *OK*

Attorneys, Department of Justice,
Washington, D. C., 20530.



QUESTIONS PRESENTED

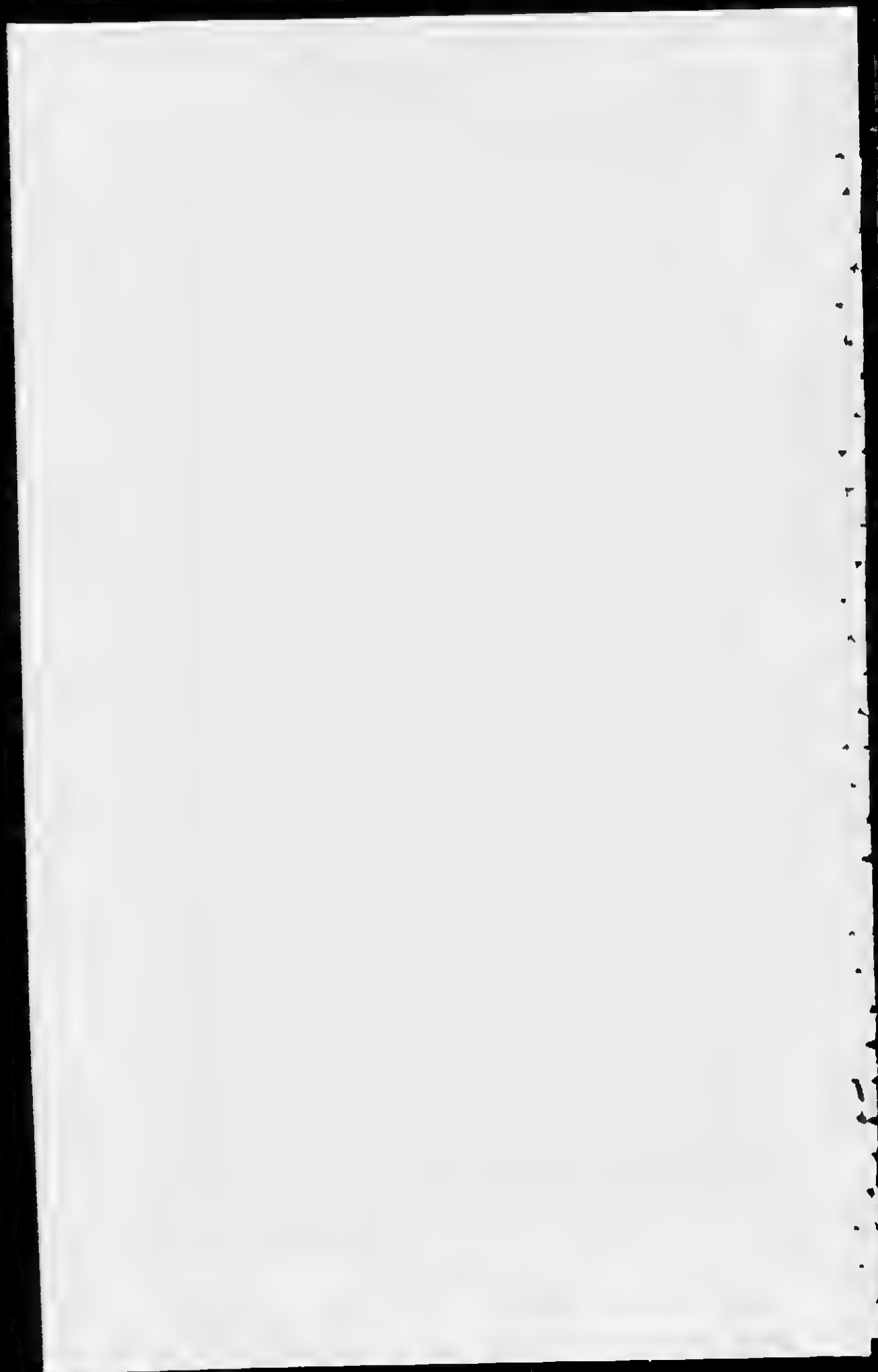
The district court has entered a permanent injunction directing the Secretary of the Interior not to take any action to interfere with plaintiff's contract as attorney for the Navajo Indian Tribe, with provisions designed to require the Secretary, the Chairman of the Tribal Council, and officials of the United States and the Tribe to accept the services of plaintiff as such attorney. The questions presented are:

1. Whether the court has power so to require the Secretary of the Interior and others not parties, in performing the Secretary's discretionary duties to superintend the actions of Indian tribes and their agents as to internal affairs of the tribe, and especially to compel the acceptance of personal services of such attorney.

2. Whether the Secretary of the Interior has been authorized by Congress to withdraw his approval of such an attorney's contract and to terminate his further services as attorney.

3. Whether equity should require such performance, which cannot produce harmony and mutual confidence between a person and his attorney, especially when clear breaches of trust by the attorney in past performance of his contract have been shown.

4. Whether designated purported findings of fact are erroneous because of error of law, lack of support in the evidence, they are argumentative and not factual, or for other reasons.



INDEX

	Page
Questions presented	1
Previous opinions	1
Jurisdiction	2
Statement	2
The Navajo Tribe and its Government	2
The attorney contracts and amendments	3
The controversy	7
Court proceedings	9
Statutes involved	14
Statement of points	14
Summary of argument	15
Argument:	
Introductory	19
I. The judgment is erroneous because of misunderstanding of the relative positions of the Secretary of the Interior, the Navajo Tribe and the federal court.....	20
A. The judgment assumes a power of the federal court to compel the Secretary of the Interior to accept as conclusive action of the Tribal Council and to order affirmative action the court thinks desirable as to internal affairs of the Tribe	20
B. The Secretary of the Interior is the superior, not the subordinate, of the Tribal Council	21
C. Federal courts are not authorized to interfere with or adjudicate controversies as to the internal affairs of Indian tribes	27
D. The judgment unwarrantedly seeks to control the discretionary authority of the Secretary of the Interior	30
II. The district court lacked jurisdiction affirmatively to coerce by injunction personal services of an attorney ...	32
III. The Secretary was empowered to withdraw his approval of plaintiff's contract and then terminate his future services	36
IV. Regardless of limits on the court's power, plaintiff is not entitled to invoke the equitable relief granted by the judgment	42

IV

Argument—Continued

Page

A. The district court abused its discretion in coercing, in every way possible, the Chairman of the Tribe to accept plaintiff as his attorney for all official purposes	42
B. Plaintiff's actions concerning the three matters given as cause for terminating his contract disqualify him from securing equitable relief	43
1. The history of the contract and performance under it	44
2. Use of general counsel attorneys on claims cases	47
3. Unauthorized increase in plaintiff's compensation	50
4. The <i>Healing v. Jones</i> matter	53
5. The departmental approval of the amendments to the contract does not immunize the plaintiff from responsibility for his breaches of trust	56
V. Many findings of fact are erroneous because of mistakes of law or lack of support in the evidence	56
Conclusion	58
Statutory Appendix	59

CITATIONS

Cases:

* <i>Adams v. Murphy</i> , 165 Fed. 304	33, 34
<i>Arizona v. California</i> , 373 U.S. 546	55
* <i>Armstrong v. United States</i> , 306 F.2d 520	22
<i>Bar Association of San Francisco v. Cantrell</i> , 49 Cal.App. 468, 193 Pac. 598	50
<i>Bethlehem Engineering Export Corp. v. Christie</i> , 26 F.Supp. 121, aff'd, 105 F.2d 933	33
<i>Bishop of Nesqually v. Gibbon</i> , 158 U.S. 155.....	24
<i>Board of Comm'rs v. Seber</i> , 318 U.S. 705	21
* <i>Boesche v. Udall</i> , 373 U.S. 472	37, 56
<i>Casebolt v. Mid-Continent Airlines</i> , 85 F.Supp. 915.....	33
<i>Colo. Bar Ass'n. v. Betts</i> , 26 Colo. 521, 58 Pac. 1091	49
<i>Coviello v. State Bar</i> , 45 Cal.2d 57, 286 P.2d 357	50
<i>Dicke v. Cheyenne-Arapaho Tribes, Inc.</i> , 304 F.2d 113	28
<i>Doggett v. Deauville Corp.</i> , 148 F.2d 881	33
<i>Globe Steel Abrasive Company v. National Metal Abrasive Company</i> , 101 F.2d 489	51

*Cases chiefly relied upon have been marked with an asterisk.

Cases—Continued

Page

<i>Healing v. Jones</i> , 174 F.Supp. 211	53
<i>Healing v. Jones</i> , 210 F.Supp. 125, aff'd 373 U.S. 758	53
* <i>In Re Chopnak</i> , 43 F.Supp. 106	51
<i>In re McCrory Stores Corporation</i> , 91 F.2d 947, cert. den., 302 U.S. 725	33
<i>In Re Schatz</i> , 277 App.Div. 51, 97 N.Y.S.2d 902	50
<i>Larson v. Domestic & Foreign Corp.</i> , 337 U.S. 682	34
<i>Laurens v. Northern Iowa Gas and E. Co.</i> , 262 Fed. 712	33
* <i>Littell v. Nakai</i> , 344 F.2d 486, cert. den., — U.S. —	27
<i>Martinez v. Southern Ute Tribe of Southern Ute Res.</i> , 249 F.2d 915, cert. den., 356 U.S. 960	28
<i>Memphis and Shelby County Bar Ass'n. v. Sanderson</i> , 52 Tenn.App. 684, 378 S.W.2d 173	49
<i>Mott v. United States</i> , 283 U.S. 747	38
* <i>Native American Church v. Navajo Tribal Council</i> , 272 F.2d 131	28
<i>Ohio State Bar Ass'n. v. Gray</i> , 1 Ohio St.2d 97, 204 N.E.2d 683	49
* <i>Oneida Tribe of Indians v. United States</i> , 165 C.Cls. 487, cert. den., 379 U.S. 946	27
<i>Parker v. Richard</i> , 250 U.S. 235	24
<i>People v. Board of Review of Cook County</i> , 351 Ill. 206, 184 N.E. 332	50
<i>People ex rel. Black v. Smith</i> , 290 Ill. 241, 124 N.E. 807	49
<i>Poultry Producers v. Barlow</i> , 189 Cal. 278, 208 Pac. 93	32
* <i>Prairie Band of the Pottawatomie Tribe v. Udall</i> , — F.2d	28, 30
<i>Prairie Band of Pottawatomie Tribe of Indians v. Puckkee</i> , 321 F.2d 767	28
<i>Precision Co. v. Automotive Co.</i> , 324 U.S. 806	44
* <i>Rainbow v. Young</i> , 161 Fed. 835	23
* <i>Ridge v. Healy</i> , 251 Fed. 798, Anno. 19 A.L.R. 847	43
<i>Schwartz v. Broadcast Music</i> , 130 F.Supp. 956	33, 34
<i>S.E.C. v. Capital Gains Bureau</i> , 375 U.S. 180	39
* <i>Seminole Nation v. United States</i> , 316 U.S. 286	26
<i>Shubert v. Woodward</i> , 167 Fed. 47	33
<i>Skokomish Indian Tribe v. France</i> , 269 F.2d 555	22
* <i>Spilker v. Hankin</i> , 88 U.S.App.D.C. 206, 188 F.2d 35	44, 52
<i>Starr v. Campbell</i> , 208 U.S. 527	38
<i>State ex rel. Oklahoma Bar Ass'n. v. Hood</i> , 406 P.2d 978	49
<i>Strickler Engineering Corp. v. Seminar, Inc.</i> , 122 A.2d 563	44
<i>Stuart v. Wyoming Rancho Company</i> , 128 U.S. 383	52
<i>Taussig v. Corbin</i> , 142 Fed. 660	33
<i>The Florida Bar v. Enwright</i> , 172 So.2d 584	49
<i>Tiger v. Western Investment Co.</i> , 221 U.S. 286	21
<i>United States v. Barnsdall Oil Co.</i> , 127 F.2d 1019	24

*Cases chiefly relied upon have been marked with an asterisk.

VI

Cases—Continued

	Page
<i>United States v. Birdsall</i> , 233 U.S. 223	23
<i>United States v. Eastman</i> , 118 F.2d 421, cert. den., 314 U.S. 635	38
* <i>United States v. Fullard-Leo</i> , 156 F.2d 756, aff'd, 331 U.S. 256	20
<i>United States v. Macdaniel</i> , 7 Pet. 1	24
<i>United States v. Seminole Nation</i> , 173 F.Supp. 784	27
<i>United States v. Stringer</i> , 124 F.Supp. 705	52
<i>Warren Trading Post v. Tax Comm'n</i> , 380 U.S. 685	55
<i>West v. Hitchcock</i> , 205 U.S. 80	24

Statutes:

R.S. 441, 5 Stat. 485	22, 23
R.S. 463, 25 U.S.C. sec. 2	22, 23
R.S. 2058	23
R.S. 2149	23
Wheeler-Howard Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. sec. 461	25
Act of June 26, 1936, 49 Stat. 1984, 25 U.S.C. sec. 81a	41
Act of April 19, 1950, 64 Stat. 44, Section 6, 25 U.S.C. sec. 636	25
Act of June 17, 1957, 71 Stat. 157	21
Act of July 22, 1958, 72 Stat. 403	53
25 U.S.C. sec. 81	31, 39, 40, 45
25 U.S.C. sec. 82	39, 40
28 U.S.C. sec. 1361	30
28 U.S.C. sec. 1391(e)	30

Miscellaneous:

Canons of Professional Ethics, American Bar Ass'n, Nos. 11, 12, 13	18
28 C.F.R. sec. 0.20	27
<i>Federal Indian Law</i> (G.P.O. 1958)	24
H. Rept. No. 98, 42d Cong., 3d sess. (1873), Cong. Doc. Ser. No. 1578	39, 40
Pomeroy, <i>Equity Jurisprudence</i> (5th ed. 1941) secs. 397-404	43
Restatement of Contracts, secs. 471(c) and 472(1)(b) (1932)	52
Rule 17(g) C.A. D.C.	56
S. Rept. No. 8, 83d Cong., 1st sess. (1953), Cong. Doc. Ser. No. 11659	41
<i>The Navajo Yearbook</i> , Report No. VIII (1951-1961)	25
Williston, <i>Contracts</i> (1937) sec. 1499	52

*Cases chiefly relied upon have been marked with an asterisk.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,725

STEWART L. UDALL, Secretary of the Interior, APPELLANT

v.

NORMAN M. LITTELL, APPELLEE

**Appeal from the United States District Court
for the District of Columbia**

**BRIEF FOR STEWART L. UDALL,
SECRETARY OF THE INTERIOR, APPELLANT**

PREVIOUS OPINIONS

An opinion of this Court sustaining a preliminary injunction (JA 351) is reported at U.S.App. D.C. , 338 F.2d 537. An opinion of the district court on motion to cite for contempt (JA 367), not reported when issued, is now included in its opinion on permanent injunction (JA 2628) reported at 242 F.Supp. 635.

JURISDICTION

The jurisdiction of the district court was invoked under Sections 88 and 1331 of Title 28 U.S.C.; Sections 305 and 306 of Title II, D.C. Code (1962 ed.); the Declaratory Judgment Act, 62 Stat. 964, as amended, 63 Stat. 105, 28 U.S.C. secs. 2201, 2202; and the Administrative Procedure Act, 5 U.S.C. sec. 1000 *et seq.* (JA 2). The permanent injunction was issued on May 26, 1965 (JA 2683), and notice of appeal was filed on July 23, 1965 (JA 2680). The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1291.

STATEMENT

This is an appeal from a permanent injunction controlling action by the Department of the Interior relating to plaintiff's contract as an attorney with the Navajo Indian Tribe. After this Court affirmed the issuance of the preliminary injunction, extensive proceedings were had in the district court, including a trial on a motion to cite the defendant for contempt for violating the injunction, a two-week trial on the merits and other hearings. The controversy in all its incidents was explored at length. As we detail later, we object to the court's findings in many particulars, because premised on erroneous legal assumptions, unjustified inferences or conclusions, and because of lack of substantial evidence. For purposes of this Statement we believe the following facts are undisputed.

The Navajo Tribe and Its Government

The Tribe, with a 100,000 population, occupies some 24,000 square miles in Arizona, New Mexico, Utah and Colorado. Although originally very poor monetarily, income (mostly from mineral interests) has risen in recent years to \$1,000,000 a month, and the Tribe now has an \$80,000,000 credit in the Federal Treasury (JA 11, 13).

The tribal headquarters is at Window Rock, Arizona, a settlement with a population of 400. The executive head is the Chairman, who is elected every four years. He is aided by a nine-member Advisory Committee appointed by him¹ (JA 159). The legislature is the Tribal Council, composed of 74 delegates elected every four years from various districts within the reservation (JA 159, 2644). It normally meets four times a year, and its business is conducted in English and the Navajo language through translators. The exact degree of intelligence and education of these members was the subject of testimony at the trial (JA 1251, 1344, 1840, 1849). The Bureau of Indian Affairs (BIA) has a superintendent's office at Window Rock for the Navajos and an area director's office, superior to several Indian agencies, at Gallup, New Mexico, 26 miles from Window Rock (JA 958, 964). BIA representatives attend Council meetings, where they have a specified seat location (JA 964, 937). The plaintiff is head of the legal department of the Tribe, which has its office at Window Rock, but no private attorney is located there and the plaintiff's office is in Washington, D. C. (JA 1333).

The Attorney Contracts and Amendments

In 1947, a contract was executed by which plaintiff and two associates became attorneys for the Tribe (JA 22). The contract first provided that they should act as General Counsel for the Tribe and appear before all courts, departments, tribunals, etc., in all tribal matters (JA 23). Next, it provided that it was the duty of the attorneys to investigate and formulate any and all claims of the said Indians against the United States and officers thereof, including claims arising out of designated treaties, etc. (JA 23). The contract provided that the attorneys should perform their duties under the contract upon the request of and at the direction of a Committee of the Tribal Council to be selected.

¹ Changes in size and method of appointment were made after this controversy began.

Compensation for general counsel retainer was fixed at \$7,500 per annum, plus expenses to a maximum of \$25,000 (JA 23-24). For claims work, compensation was fixed at 10 percent of any sum of money or of the value of property recovered. There follow provisions for payment etc., in the event of termination. The contract also provided:

12. *Termination:* (a) The Tribal Council may terminate this contract for good cause shown in respect to any one or all of second parties' services as General Counsel after giving sixty days' notice to any of second parties in respect to which termination is sought, the said termination to become effective upon approval of the Commissioner of Indian Affairs, PROVIDED, HOWEVER, that in the event of disagreement between the parties as to the sufficiency of the cause, the question shall be submitted to the Secretary of the Interior. * * *

The 10-year term of that contract expired and, after an interim agreement, which was never approved by the Commissioner of Indian Affairs or the Secretary, the contract here involved was executed (JA 1262, 1337). This covered plaintiff and three associates and divided general counsel and claims functions in the language of the earlier contract (JA 35). Compensation for plaintiff as General Counsel was fixed at \$25,000 and for three other associates in designated amounts totaling \$23,850 (JA 38). It was provided that the duties of two of the associates should not include any work on claims and that they should not work on or share in distribution of compensation for claims unless plaintiff should otherwise direct in writing, with the approval of the Advisory Committee and the Commissioner of Indian Affairs (JA 39). It was provided that increases might be made by so providing in the tribal budget, subject to approval by the Tribal Council and the Commissioner of Indian Affairs, "Provided Further that there shall be no change in the compensation of Mr. Littell and Mr. Alexander during the first five years of this contract" (JA 40).

Plaintiff and Alexander "as compensation for investigating, formulating and prosecuting claims of the said Indians against the United States" were to receive 10 percent of any sums of money or the value of property recovered. The contract then listed five specific claims filed before the Indian Claims Commission, and the contract repeated the 10 percent compensation provision, which should be full and complete for the services of plaintiff (JA 40). Alternatively, as to any claim prosecuted for the recovery of lands or right to possess or use lands (excluding one of the five specifically named cases or similar claim for compensation), plaintiff might, subject to the approval of the Council and the Commissioner, elect to receive a percentage of bonuses, royalties or other income from the land as agreed between the parties, not to exceed one percent of such royalties.

As to cost and expenses, the contract provided that General Counsel salaries and expenses should be paid by the Tribe out of the funds of the Tribe, and in accordance with the payroll practices of the Tribe and with approval of the Commissioner (JA 42). Claims expenses were also to be paid pursuant to itemized vouchers, with the approval of the Commissioner (JA 43). The contract also provides:

3. Direction by Chairman, Advisory Committee, and Council: The said attorneys shall perform the duties required of them under this contract upon the request and at the direction of the Chairman of the Navajo Tribal Council, subject to such instructions as he may receive from time to time from the Advisory Committee or the Tribal Council. The General Counsel shall report to the Tribal Council at any regular or special meeting on any matters pertaining to the legal affairs of the Tribe when in his opinion or that of the Chairman, the Advisory Committee, or the Tribal Council, the best interests of the Tribe so require.

On September 24, 1957, prior to its execution, the plaintiff discussed the 1957 contract with the nine-man

Advisory Committee of the Tribe but the minutes of the Advisory Committee meeting were not published or ~~distributed~~ distributed to the Tribal Council or to the Tribe generally and were not discovered by representatives of the Department of the Interior until November 1963 (JA 1265). The 1957 contract differed from the 1947 contract on a number of important matters, as will be shown in the Argument, *infra*.

The contract was approved by the Deputy Commissioner of Indian Affairs subject to nine conditions, three of which added requirements for approval of the Commissioner to certain actions, another added the proviso as to no other secretarial claim for the full-time secretary where paid by the Tribe, and another required notification to the Commissioner of any change in authority to sign vouchers. Finally, the Deputy Commissioner required the insertion of the condition as to the General Counsel compensation "provided, further, that there shall be no change in the compensation of Mr. Littell and Mr. Alexander during the first five years of this contract" (JA 48-50).

Between 1958 and 1962, 11 amendments were made to the contract, all with the approval of the Secretary, the Commissioner or other official to whom authority had been delegated. The first amendment provided for the employment of Joseph McPherson and Walter Wolf, Jr., at annual salaries of \$20,000 and \$6,500, respectively, for General Counsel services only, and (JA 50-53):

* * * not in any respect whatsoever pertaining to claims, unless the General Counsel shall otherwise direct by written instructions to said Attorneys by and with the approval of the Advisory Committee of the Navajo Tribal Council and the Commissioner.

Most of the amendments dealt with the employment of additional attorneys and increases of salaries, with the attendant result that plaintiff's retainer was increased to \$35,000, and by 1963 six associate attorneys then employed under him at Window Rock and Washington, D.C., received a total salary of some \$95,000 (JA 54-114).

The procedure for amendment is described in detail later herein. Other amendments changed the provisions relating to succession of duties in the event of plaintiff's death or incapacity (JA 87), and Amendment No. 11, in 1962, added two cases by name, *Healing v. Jones* and *Navajo Tribe v. Utah*, to the list of specifically named claims cases (JA 103). Also prior to that, in July 1960, a resolution approving the removal of limitations against claims work by McPherson and Wolf was approved (JA 139-141).

The Controversy

In March 1963, the regular four-year election for Chairman of the Navajo Tribal Council was held. In that election three candidates campaigned. Paul Jones, the incumbent, sought re-election, and Raymond Nakai and Samuel Billison ran against him (JA 319). For a considerable time prior to March 1963, Raymond Nakai, in radio speeches and public appearances, had consistently voiced opposition to the continued employment by the Tribe of plaintiff as General Counsel (JA 1120). Nakai campaigned for the office of Chairman of the Tribal Council, primarily on a platform "to get rid of Mr. Littell." He advocated less interference in tribal affairs by plaintiff and the legal department of the Navajo Tribal Council, which is under the supervision of plaintiff as General Counsel (JA 780-781). He charged that plaintiff was exerting influence on nonlegal affairs of the Tribe (JA 1120) and that plaintiff's conduct in obtaining amendments to the 1957 contract, by which his annual compensation was increased from \$25,000 to \$35,000, contrary to the provisions of paragraph 4(a) of the contract, and an amendment classifying *Healing v. Jones* as a "claims" case, had been improper and should be investigated (JA 1120, 1177, 1232).

Nakai was elected Chairman of the Tribal Council and requested plaintiff to stay out of tribal political activity (JA 1121). Informal conferences were held between

Nakai, the Secretary, other officials of the Department of the Interior, and officers of the Navajo Tribe, in April, May and June 1963. The Chairman and the Advisory Committee in June 1963 requested the Secretary of the Interior to remove plaintiff as tribal attorney (JA 2649-2650). A "Committee of Opposition" to this was organized, further conferences and communications ensued, and an investigation of Interior Department files concerning various matters was conducted (JA 252-261).

Plaintiff, having learned from friends of the fact that the new Navajo administration was consulting other attorneys and seeking plaintiff's dismissal, met with the Secretary in mid-October and the matter came to a head on November 1, 1963, when the Secretary addressed to plaintiff a letter which enclosed two memoranda of the Solicitor and a copy of a letter to the Chairman of the Tribal Council, and stated (JA 220-221):

(a) Your personal performance under the Attorney Contract of the Navajo Tribe dated October 8, 1957, as amended, is hereby suspended;

(b) Your contract will be terminated as of December 1, 1963, unless, in the interim, you can adduce convincing evidence that the conclusions justifying suspension and termination are unwarranted; and

(c) Approval of said contract and all amendments thereto, insofar as such approval relates to your personal performance and right to compensation, is hereby rescinded and withdrawn. Furthermore, I have directed that no payments be made to you under said contract until further notice.

I have directed that you shall have a full and fair opportunity to present to the Solicitor any evidence which you have by way of explanation or exculpation. I would suggest that you promptly submit such evidence directly to the Solicitor.

The Solicitor's memoranda stated that a complete investigation would require some time and that this investigation would be limited to three designated matters. A

second memorandum, marked "Confidential" because plaintiff had not had the opportunity to answer the particular document, was submitted, which emphasized the attorney-client relationship and the attorney's duties, especially with regard to Indian tribes. Various matters were then detailed which led to the conclusion that the record disclosed that, rather than following his duties as a fiduciary of the Tribe, plaintiff had taken advantage of the Tribe's confidence in him to serve his own interest.

Court Proceedings

The plaintiff did not reply to the letters of November 1 and 7, 1963, from the Secretary and the Solicitor, but instead filed the present action, alleging that the Secretary's acts were in excess of statutory authority and were arbitrary and capricious. A preliminary injunction was issued by the district court (JA 2, 345). The Secretary appealed from the order granting the preliminary injunction (JA 351) and, while the appeal was pending and before decision, the plaintiff, on December 16, 1963, filed a motion for an order adjudicating the Secretary and one Zimmerman in contempt for violation of the preliminary injunction. The plaintiff charged that the Secretary and his agents interfered with the plaintiff's contractual relationship, contrary to the terms of the preliminary injunction, by causing the Chairman of the Tribal Council to eject him from a meeting of the Council at which he asserted he had a right to appear by reason of the contract. A trial of some days' duration was held at which plaintiff's evidence revolved primarily around the claim that Interior Department employees, rather than remaining silent, were obliged to force a hearing of plaintiff by the entire Council. The court denied the motion on the ground that the evidence failed to establish any conspiracy on the part of the Secretary and his agents, stating, however, that the Secretary should require Nakai to cease his opposition to plaintiff (JA 367, 1027).

On August 13, 1964, this Court affirmed the judgment granting the preliminary injunction by a two-to-one decision. U.S.App.D.C. , 338 F.2d 537. Thereafter, the Secretary filed a petition for rehearing or for clarification (JA 362), which was denied. A motion filed in the district court by the Secretary on September 11, 1964, to clarify paragraph 3 of the order relating to the payment of vouchers, was denied.

After remand to the district court, the Secretary filed an answer to the complaint for injunction and declaratory relief, having obtained extensions of time which were still in force. In the answer (JA 1028), the Secretary reasserted that his grounds for initiating proceedings for rescission and termination of the plaintiff's contract were substantial, were not arbitrary or capricious, and were not in excess of the Secretary's authority. In further defense, the Secretary asserted that he has authority to supervise the performance of attorneys contracts with Indian tribes, which embraces authority to investigate attorney activities and approve or disapprove vouchers for payments under such contract, and that the information submitted to him by the Chairman of the Navajo Tribal Council and the information uncovered during the beginning of an investigation involved charges of such a serious nature as to plaintiff's conduct in the performance of his duties and that the charges and conduct are such that plaintiff is not entitled to equitable relief; in other words, that plaintiff is not entitled to equitable relief because he comes into court with unclean hands.

The essence of the charges against the plaintiff was that he violated the high duty and the high degree of trust imposed upon him by virtue of his attorney-client relationship by

(1) receiving an increase in compensation from \$25,000 to \$35,000 per annum in 1961, in violation of the express provision in paragraph 4(a) of his contract that there shall be no change in the attorney's compensation for the first five years, and without disclosure to the Tribe;

(2) obtaining the approval of Amendment No. 11 to the contract, which expressly classified the case of *Healing v. Jones* as a claims case, without disclosing to the Tribal Council or to the Secretary that the resolution which authorized Amendment No. 11 did not authorize a change in the classification of that litigation, and that cases such as *Healing v. Jones* are not properly "claims" cases in any event, and that plaintiff is guilty of a breach of trust and overreaching by placing himself in a position to claim a contingent fee of as much as 10 percent of the value or of the property supposedly recovered in *Healing v. Jones*; and

(3) frequently directing associate attorneys, employed for General Counsel services only, to work on claims cases for plaintiff's benefit and at the expense of the Tribe and without making disclosure of that fact to either the Tribe or the Department of the Interior.

Thereafter, pretrial proceedings were had and a full two-week trial on the merits of these defenses, as well as many other matters, followed. The testimony of numerous witnesses, including the plaintiff (JA 1333), the Secretary (JA 1618), the Solicitor of the Department of the Interior (JA 1704), Nakai, the Chairman of the Tribal Council (JA 1117), and members of the Council, was adduced. Voluminous documentary exhibits were received in evidence.

On May 26, 1965, the district court issued a permanent injunction, together with an opinion, findings of fact, conclusions of law and an appendix incorporating its opinion issued after the conclusion of the proceedings to cite the Secretary for contempt for violating the injunction.

The permanent injunction adjudged, ordered, decreed and declared:

1. That the appellant is without power or authority to terminate plaintiff's contract;
2. That the action taken by the Secretary on November 1, 1963, informing plaintiff that his contract

was suspended and that it would be terminated unless good cause was shown within 30 days, was arbitrary and capricious and in abuse and in excess of the Secretary's legal powers and authority; and

3. That the plaintiff has the legal right and authority to perform all duties and obligations as General Counsel, including, but not limited to making reports to the Chairman, the Advisory Committee, or the Tribal Council, on any matters pertaining to the legal affairs of the Tribe when in plaintiff's opinion the best interests of the Tribe so require.

Further, the permanent injunction also enjoined the Secretary, his officers, agents, subordinates and employees, and any and all persons acting under his authority or direction, and all persons acting in participation or concert with them who have actual notice, from (1) terminating or canceling plaintiff's contract; (2) suspending or otherwise improperly interfering with performance by plaintiff of said contract; (3) stopping or preventing the ordinary course of payment to him of the agreed retainer fee; (4) stopping or preventing the ordinary course of payment of reasonable and proper costs and expenses; and (5) directly or indirectly or alone or in concert with others preventing the free exercise by the plaintiff of his duties as General Counsel and claims attorney, including but not limited to any action or conduct preventing plaintiff from making reports to the Chairman, the Advisory Committee, or the Tribal Council. The permanent injunction requires that the Secretary and all of the officers and employees and other persons mentioned recognize the plaintiff as the General Counsel and claims attorney of the Navajo Tribe so long as the 1957 contract remains in force. It also requires (JA 2683):

2. That during such period the defendant and all of his subordinates are further enjoined and ordered to treat with, confer and negotiate with the plaintiff, Norman M. Littell, on the same footing as that which existed prior to April 13, 1963, on all occasions when it is customary or appropriate in the conduct

of official intercourse or business with the Navajo Tribe of Indians to treat with, confer with, or negotiate with the General Counsel and Claims Attorney of the said Tribe; and

3. That whenever vouchers submitted by the plaintiff pursuant to his said contract to the appropriate certifying and approving officers of the Navajo Tribe of Indians shall not have been forwarded by said officers of the Navajo Tribe to the Department of the Interior within a period of thirty (30) days after receipt thereof, then in such event the defendant and all of his subordinates are further enjoined and ordered to take such vouchers from such officers of the Navajo Tribe, and to proceed, notwithstanding the provisions of the plaintiff's said contract, to process said vouchers in accordance with customary and established practices of audit of similar vouchers, subject only to such review for sufficiency of form and substance as is required by the governing law and regulations.

The trial court entered 118 findings of fact in which it found the facts to be essentially as set forth in the foregoing statement. Those findings contain, however, many inferences and conclusions which we believe to be legally erroneous. The court concluded that the Secretary is without power or authority to terminate the plaintiff's contract under the circumstances of this dispute; that, notwithstanding the provisions of 25 U.S.C. sec. 82, which provides that no voucher for attorneys' services may be paid unless first approved by the Secretary or the Commissioner of Indian Affairs, the Secretary is not to be permitted to do more than audit plaintiff's vouchers in the ordinary course; and that, despite the fact that the court found that plaintiff had received a general increase, contrary to the provisions of the 1957 contract which prohibited any increase in his compensation during the first five years, and had used general counsel attorneys on claims work for the plaintiff's benefit, in the face of contrary contract provision, nevertheless the plaintiff does not come into court with unclean hands and, since the

Secretary is not a party to the contract, he has no standing to raise that defense in any event.

STATUTES INVOLVED

The relevant provisions of the Act of June 17, 1957, 71 Stat. 157, 5 U.S.C. sec. 485; R.S. sec. 463, 25 U.S.C. sec. 2; R.S. sec. 2103, as amended by the Act of August 27, 1958, 72 Stat. 927, 25 U.S.C. sec. 81; R.S. sec. 2104, 25 U.S.C. sec. 82; and Section 1 of the Act of August 26, 1936, 49 Stat. 1984, 25 U.S.C. sec. 81a, are set forth in the Appendix, *infra*.

STATEMENT OF POINTS

The district court erred:

1. In entering judgment for the plaintiff.
2. In holding that the Secretary is without power to terminate plaintiff's contract.
3. In holding that the actions listed as (a), (b) and (c) in the judgment were arbitrary and capricious and in abuse of and in excess of the Secretary's legal powers.
4. In enjoining the Secretary and others named from terminating plaintiff's contract, from interfering with performance thereof, and from preventing payments in ordinary course.
5. In directing the Secretary and his subordinates to treat, confer and negotiate with plaintiff.
6. In directing the Secretary and his subordinates to take vouchers from officers of the Navajo Tribe and to process them without tribal approval.
7. In holding that the Secretary had exceeded his powers as Secretary of the Interior.
8. In holding that the Secretary's actions were not within the authority delegated to him by Congress.
9. In holding that approval given by the Secretary under 25 U.S.C. sec. 81 could not be withdrawn.
10. In holding that the Secretary lacked power to discontinue plaintiff's services.

11. In holding that the Secretary had no authority under 28 U.S.C. sec. 82 to reject vouchers presented by the plaintiff.

12. In holding that plaintiff is entitled to equitable relief against the Secretary.

13. In holding that the powers and duties of the Secretary are subordinate to the Navajo Tribal Council or other authority of the Tribe.

14. In concluding that the action taken by the Secretary on November 1, 1963, and further threatened action, was in excess of legal power or authority.

15. In entering conclusions of law numbered 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22 and 23.

16. In entering findings of fact numbered 9, 12, 20, 21, 22A, 24, 29, 36, 47, 48, 49, 55, 58, 62, 66, 68, 72, 73, 75, 76, 78, 80, 92, 103, 106, 107, 113, 115, 116 and 118.

17. In entering any findings as to events subsequent to termination (Fds. 82-107), since all such events are irrelevant to any issue in this case.

SUMMARY OF ARGUMENT

I

A. The judgment is founded upon several erroneous premises of law which vitiate the entire proceedings and compel dismissal of the case. These are: (1) The action of the majority of the Tribal Council is controlling, even upon the Secretary of the Interior. (2) The federal district court has power to order affirmatively action designed to coerce performance of plaintiff's contract. (3) The federal district court has jurisdiction to control internal action of the Navajo Indian Tribe, including conduct of its meetings and the relations between two of its agents, its Chairman and the plaintiff. (4) The federal district court has jurisdiction affirmatively to control non-ministerial action of the Secretary of the Interior for the purpose of promoting performance of plaintiff's contract.

B. The law and practice have been well settled for more

than a century that it is the power and the duty of the Secretary to exercise the federal guardianship of Indian tribes by supervising actions of chiefs, councils and all other bodies of the tribes and by taking whatever action is appropriate to prevent mistakes on the part of such representatives of the tribes or to correct them. This power and duty become important primarily in cases where the majority of a council, or other governing body, proposes to take wrong action or refuses to correct mistakes. This power rests on general delegation from Congress and does not require specific statutory authorization as to the particular action involved. The Navajo government was created under this general power by regulation without any express statute of Congress.

This duty is so clear that the United States has been held liable to the tribe when it failed to control a tribal council not acting for the best interests of all the tribe.

C. In *Littell v. Nakai*, 344 F.2d 486 (C.A. 9, 1965), cert. den., U.S., the federal court refused to entertain a suit by plaintiff against the Chairman of the Tribe to permit plaintiff to represent the Tribal Council, on the ground that it related to internal affairs of the Tribe with which the court would not interfere. This is settled law. The judgment of the trial court clearly and intentionally undertakes to control intra-tribal matters concerning relations of its two agents, the Chairman of the Tribe and its contract attorney.

D. By the judgment, the court undertakes to supervise and control action of the Secretary of the Interior, not as to ministerial action, but as to questions of approval or disapproval, which are clearly within the exercise of his discretion. Congress has not vested the federal court with any such power. It is not the court's business to decide what it thinks will resolve this controversy and then compel the Secretary to act accordingly, including "to treat with, confer and negotiate with plaintiff."

II

Equity courts have uniformly denied authority to coerce the performance of continuing personal services, especially of attorneys. This applies whether the coercion is direct or indirect. And a client can discharge his attorney at any time because of the personal and confidential relationship involved.

The fact that for other legal purposes the technical client is that nonpersonal entity, "the Tribe," does not permit an exception to the rule. The unalterable fact is that the judgment is designed to compel Nakai, the Tribal Chairman (and the Secretary), to accept the services of plaintiff as his attorney. The reason equity refuses attorneys such relief applies with full force here. The Chairman cannot have trust and confidence in the advice the court compels him to accept from plaintiff. The court cannot force a relationship of harmony and spirit of cooperation between plaintiff and Nakai and the Secretary. The judgment would force the court, by contempt proceedings, continually to supervise the rendering of such services and to judge the merits of controversies whenever the Chairman or the Secretary should reject plaintiff's advice.

III

The Secretary was empowered, under his general duty to supervise Indian tribes, to withdraw his approval of plaintiff's contract and to terminate it so far as future services were concerned. The statute neither gives nor withholds that power explicitly. All considerations of analogous decisions, the Secretary's duties, the legislative history, and purposes of the statute support an existence of such authority. No room appears why it should be denied to the Secretary.

IV

Even assuming the court has the powers it asserts, and that the Secretary's authority is narrowly limited as plaintiff claimed and the trial court agreed, plaintiff's conduct precluded the granting to him of the judgment awarded.

A. The reckless nature of charges made by plaintiff and his own testimony show that he cannot give to the Chairman that objective, dispassionate advice he is entitled to receive from the attorney he is obliged to consult.

B. The three specific charges given as a basis for suspension of plaintiff were fully proven. Any plaintiff in equity must have clean hands, and an attorney dealing with his client must make the most complete and fullest disclosure. Contracts with a client are presumptively fraudulent for the obvious reason that otherwise the client might be forced to seek another attorney to examine the proposed changes.

Thus, amendments to the contract, which are the prime defense of plaintiff, were presumptively fraudulent.

The fact was admitted that plaintiff used "general counsel" attorneys on "claims" work without authorization or deduction from their compensation for the time so spent. This was an admitted diversion from the work for which they have been paid by the Tribe to perform, upon which plaintiff would secure a contingent fee. In other words, plaintiff overcharged the Tribe and deprived it of those services. This is just as clear a breach of trust as if plaintiff had put in his own bank account part of the compensation of those attorneys. Commingling of funds is unethical, regardless of whether the client ultimately loses, and overcharging is obviously unethical. Canons of Professional Ethics, American Bar Ass'n, Nos. 11, 12 and 13.

The fact that the Tribe might recoup its loss by using the overpayments, now discovered, against other claims

of plaintiff does not, as the court below held, eliminate or excuse the unethical conduct.

The second charge, that plaintiff violated the express limitation on the increase of his compensation, was likewise admitted. The fact that the Tribal Council and the Department mistakenly approved such violation does not eliminate its existence. The very assertion of that defense shows another breach of trust in failing to make full disclosure that the increase provided by the resolution was contrary to plaintiff's contract.

The assertion of a contingent fee for *Healing v. Jones* likewise shows breach of trust in attempting to build a record to justify an unauthorized and exorbitant fee and in failing to make full disclosure, especially as to the amendment to the contract purporting to list *Healing* as a claims case. Here again the fact that the attempt at securing the fee has not yet succeeded does not change the breach of trust. Nor does the fact that plaintiff didn't need the amendment he secured to assert such a claim. Securing the amendment without Council approval and without full disclosure was a breach of trust which is not excused because it has been discovered.

V

We detail particulars in which many of the facts are unsupportable for the reasons that they are founded on errors of law, they are not facts but are conclusions or argument, they are not supported by evidence, or they have other deficiencies.

ARGUMENT

Introductory.—There was much discussion as to the meaning of this Court's decision in the court below.² The ultimate result was a complete trial on the merits, this Court having said (JA 359-360): "We voice no opinion

² Plaintiff in a press release claimed that this Court's opinion "does far more than vindicate my personal position" (JA 1971).

on the merits." The facts are far different from those appearing by affidavits on the previous appeal. To the extent that it may be argued that some contentions herein are answered by the first opinion, it was not a final judgment and, at most, would be the law of the case. That rule does not prevent this Court from re-examining any holding of the previous opinion where the judgment was not final and from now applying the correct law. *United States v. Fullard-Leo*, 156 F.2d 756, 757 (C.A. 9, 1946), *aff'd*, 331 U.S. 256. Therefore, we approach this appeal as if we are writing on a clean slate.

I

The Judgment is Erroneous Because of Misunderstanding of the Relative Positions of the Secretary of the Interior, the Navajo Tribe and the Federal Court

A. *The judgment assumes a power of the federal court to compel the Secretary of the Interior to accept as conclusive action of the Tribal Council and to order affirmative action the court thinks desirable as to internal affairs of the Tribe.*—Throughout proceedings below both as to contempt and on the merits, the trial court expressed the notion that action of the majority of the Tribal Council is controlling. Thus, the opinion as to contempt states that the only course open to the Secretary was submission of the controversy to the Tribal Council for majority action (JA 2642B). The necessity for Tribal Council action was emphasized every day during the trial on the merits. The findings of fact and conclusions of law and opinion likewise attach controlling importance to the action of a majority of the Tribal Council (JA 2675, 2618, 2676).³

³ This was so obviously the law in the mind of the trial court that it concluded that, since the Secretary well knew that such was plainly the law (a wrong assumption), the Secretary acted wrongfully in failing to seek and to accept action of the majority of the Tribal Council (JA 2612, 2619).

The prime basis for the charge of contempt was that Interior Department representatives could not take a neutral position but were obliged affirmatively to force the Chairman to permit the plaintiff to address the Council (JA 368, 500). This position was adopted by the trial court as its final opinion, saying that if it had known the facts at the trial earlier it would have held the preliminary injunction to have been violated (JA 2614). Thus, it clearly contemplates that the permanent injunction compels such affirmative action.

The injunction is plainly intended to compel affirmative action of the Secretary and his subordinates for the purpose primarily of coercing the Chairman in the performance of his functions. The injunction further controls affirmative action of the Secretary as to dealings with the plaintiff and approval of payments to him (JA 2683). These notions and provisions are, we submit, an attempted usurpation by the court of the powers and duties of the Secretary of the Interior and of the tribal authorities.

B. *The Secretary of the Interior is the superior, not the subordinate, of the Tribal Council.*—The position of Indian tribes has long been settled. They are independent entities which are subject to the plenary control of Congress as a legislative matter. Until 1871, this was primarily done by treaty between two sovereigns. Since that date, it has been done by statute or agreement. "The plenary character of this legislative power over various phases of Indian affairs has been recognized on many occasions." *Board of Comm'rs v. Seber*, 318 U.S. 705, 716 (1945), and cases cited fn. 18. "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been a political one, not subject to be controlled by the judicial department of the Government." *Tiger v. Western Investment Co.*, 221 U.S. 286, 311 (1911).

Congress has delegated to the Secretary of the Interior and the Commissioner of Indian Affairs the functions, duties and obligations to execute its policies in broad terms in the Act of June 17, 1957, 71 Stat. 157, successor

to R.S. 441, 5 Stat. 485, and R.S. 463, 25 U.S.C. sec. 2. Exercise of all appropriate powers to execute what has been called the federal guardianship of the Indians⁴ has been many times sustained without any additional specific statute authorizing the particular action. In *Armstrong v. United States*, 306 F.2d 520 (C.A. 10, 1962), in sustaining the conviction of persons interfering with Interior employees in the performance of their duties on an Indian reservation, the court said (p. 522):

The United States, by virtue of its status as guardian, is responsible for the protection of the Indians on a reservation so long as they are wards of the government. *United States v. Sandoval*, 231 U.S. 28, 46, 34 S.Ct. 1, 58 L.Ed. 107; *Choctaw Nation v. United States*, 119 U.S. 1, 27, 7 S.Ct. 75, 30 L.Ed. 306; *United States v. Kagama*, 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228. Congress has provided:

"The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations." Rev. Stat. § 463 (1875), 25 U.S.C.A. § 2.

This statute furnishes broad authority for the supervision and management of Indian affairs and property commensurate with the obligation of the United States. *United States v. Birdsall*, 233 U.S. 223, 34 S.Ct. 512, 58 L.Ed. 930; *United States v. Ahtanum Irrigation Dist.*, 9 Cir., 236 F.2d 321, cert. denied 352 U.S. 988, 77 S.Ct. 386, 1 L.Ed. 2d 367; *United States v. Anglin & Stevenson*, 10 Cir., 145 F.2d 622, 628, cert. denied 324 U.S. 844, 65 S.Ct. 678, 89 L.Ed. 1405; *Rainbow v. Young*, 8 Cir., 161 F. 835. See *United States ex rel. West v. Hitchcock*, 205 U.S. 80, 84, 27 S.Ct. 423, 51 L.Ed. 718. The management of water and water projects on a reservation is clearly within the scope of the general statutory authority

⁴ This, of course, is a *sui generis* relation and not a technical trusteeship. *Skokomish Indian Tribe v. France*, 269 F.2d 555 (C.A. 9, 1959).

granted to the Commissioner of Indian Affairs, and, in addition, specific legislation has been enacted pertaining to the management of water on reservations. *United States v. Ahtanum Irrigation District*, *supra*; 25 U.S.C.A. § 381 et seq.

Justice Van Devanter, then Circuit Judge, in *Rainbow v. Young*, 161 Fed. 835 (C.A. 8, 1908), when sustaining the authority of the Secretary of the Interior to exclude collectors from a reservation on the day payments were to be made to the Indians, referred to R.S. 441 and 463, *supra*; to R.S. 2058, defining the general duties of Indian agents; and to R.S. 2149 as to removal of persons from Indian reservations, and said (p. 838):

No other statute imposes any limitation applicable here upon the exercise of the authority so given to the Commissioner, and upon this record it cannot reasonably be doubted that the Commissioner, in giving to the superintendent the direction before named, acted with the approval of the Secretary of the Interior. * * * [Citations omitted.]

In our opinion the very general language of the statutes makes it quite plain that the authority conferred upon the Commissioner of Indian Affairs was intended to be sufficiently comprehensive to enable him, agreeably to the laws of Congress and to the supervision of the President and the Secretary of the Interior, to manage all Indian affairs, and all matters arising out of Indian relations, with a just regard, not merely to the rights and welfare of the public, but also to the rights and welfare of the Indians, and to the duty of care and protection owing to them by reason of their state of dependency and tutelage.

Illustrative of the same approach is *United States v. Birdsall*, 233 U.S. 223 (1914), holding that, despite the absence of written rule or regulation authorizing the Commissioner to make recommendations concerning sentences for convictions of violation of the laws covering liquor traffic with the Indians, bribery to influence action in the

making of such recommendations was a violation of the statute punishing bribery to influence official action. And in *Parker v. Richard*, 250 U.S. 235 (1919), as to supervision of lease income of restricted Indian lands, Justice Van Devanter briefly remarked (p. 240): "In the absence of some provision to the contrary the supervision naturally falls to the Secretary of the Interior. Rev. Stat. § 441, 463." See also *West v. Hitchcock*, 205 U.S. 80, 85 (1907); cf. *Bishop of Nesqually v. Gibbon*, 158 U.S. 155, 167 (1895); *United States v. Barnsdall Oil Co.*, 127 F.2d 1019, 1021 (C.A. 10, 1942).

In *Rainbow*, *supra*, Justice Van Devanter had quoted from *United States v. Macdaniel*, 7 Pet. 1 (1833), that (p. 14):

"A practical knowledge of the action of any one of the great departments of the government must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow that he must show statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate by law the minute movements of every part of the complicated machinery of government would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers there are numberless things which must be done, that can neither be anticipated nor defined, and which are essential to the proper action of the government."

In *Federal Indian Law* (G.P.O. 1958), these basic principles are summarized as follows: (p. 49) "Federal administrative power over Indian affairs, vested in the Secretary of the Interior, is virtually all-inclusive." (pp. 51-52) " * * * Discretionary power to act in situations not specifically provided for, often is lodged in the Secretary."

As to the Navajos, this general power was exercised to create the present tribal government. The Wheeler-Howard Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. sec. 461 *et seq.*, provided a method of corporate organization of Indian tribes, but the Navajos voted against acting thereunder (JA 1374). Also, Section 6 of the Act of April 19, 1950, 64 Stat. 44, 46, 25 U.S.C. sec. 636, authorized adoption of a constitution by the Navajo Tribe, but no action was taken thereunder. The tribal government rests not on an Act of Congress, but on various regulations of the Secretary commencing in 1923, issued under his general authority over Indian affairs.⁵ Thus, if the situation should become impossible to solve otherwise, the Secretary has power to abolish the tribal government. This was done in the case of the Red Lake Band of Chippewa Indians in 1958. Such action was taken because of an internal schism of the Tribe.

As the record shows, local officers of the Bureau of Indian Affairs are permanently assigned to the Navajo Reservation and daily exercise the supervisory duties of the United States. As to attorneys' contracts, this supervision is shown by the approval, at times with conditions, of the contract and its many amendments and of payments to those attorneys. The federal guardianship is exercised for the purpose of protecting the Indians from their own mistakes resulting from inexperience, lack of understanding or judgment, pressure from those seeking profit from their properties, or other causes. When dealing with a tribal government, there is little occasion for invocation of the Secretary's supervisory power to correct actions by a minority. It is the mistaken action of the majority which calls for exercise of the power to protect the Indians from their own errors. Thus, in this case, the fact that a majority of the Council, however induced, may favor the plaintiff is the cause

⁵ For a description of development of the Navajo organization from a "Business Council" to the present government, see *The Navajo Yearbook*, Report No. VIII (1951-1961) pp. 375 *et seq.*

for exercise of the federal supervisory authority by the Secretary, not a reason for its nonexercise.

It is true that federal policy is to encourage the Indians, and the Navajos in particular, to handle their own affairs (JA 2627). But the necessary educational process requires federal supervision of all their actions to prevent the Indian authorities from taking action contrary to their own best interests. The assertion of the district court that the Secretary should give the majority of the Council a free hand (JA 2628, 2683) is simply a denial of federal supervision. Only Congress, not the courts or the Secretary, can so emancipate the Tribe. Until it does, the Secretary has his duty of supervision of all the Navajos, including the Tribal Council. This duty is such that, if the Secretary does not prevent erroneous action by tribal authorities, the United States may be held liable to the Tribe for resulting losses.

In *Seminole Nation v. United States*, 316 U.S. 286 (1942), payments had been made by federal officials directly to the tribal treasurer or creditors at the request of the tribal council. Reversing the Court of Claims, the Supreme Court sent the case back for findings as to whether the council was corrupt and whether federal officials knew that the tribal officials were mulcting the Nation. The applicable rule was declared as follows (316 U.S. at pp. 296-297) :

In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards. Payment of funds at the request of a tribal council which, to the knowledge of the Government officers charged with the administration of Indian affairs and the dis-

bursement of funds to satisfy treaty obligations, was composed of representatives faithless to their own people and without integrity would be a clear breach of the Government's fiduciary obligation.⁶

This reason alone, we submit, compels a reversal of the judgment, since the fundamental premise upon which it is based is wrong.

C. *Federal courts are not authorized to interfere with or adjudicate controversies as to the internal affairs of Indian tribes.*—*Littell v. Nakai*, 344 F.2d 486 (C.A. 9, 1965), cert. den., U.S. , affirmed the refusal of the United States District Court in Arizona to entertain plaintiff's suit against the Chairman to compel recognition of his alleged contract rights, including the right to appear at Council meetings. The court held that the tribal courts, not the federal courts, were the forum in which to litigate controversies as to the internal affairs of the Tribe. It said (p. 490): "Indeed the very heart of the dispute appears to center on Nakai's authority as Chairman." This constitutes one more of a heretofore uncon-

⁶ For a recent discussion of the federal obligation regardless of technical status of guardian or fiduciary not to "stand on the other side of the road and avert its [the United States'] face from the continuing loss of the timber" see *Oneida Tribe of Indians v. United States*, 165 C.Cls. 487 (1964), cert. den., 379 U.S. 946. Under the facts, it was there held that agents of the United States had done all they reasonably could. In *United States v. Seminole Nation*, 173 F.Supp. 784 (C.Cls. 1959), the United States was held liable for not canceling a sale of Indian land and reselling it.

⁷ Plaintiff went so far as to charge the Secretary with wrongdoing because he requested the Department of Justice to appear as *amicus curiae* in this case and introduced as exhibits all of the record and briefs in that case (JA 1035-1038, 1041). The fact is that, as required by regulation, 28 C.F.R. sec. 0.20, the Solicitor General approved appearance of the United States as *amicus curiae* in the Ninth Circuit and a brief was filed under the direction of the Assistant Attorney General (JA 1066). When plaintiff petitioned for certiorari, the Supreme Court invited the Solicitor General to file a brief expressing his views on the case. 382 U.S. 804 (1965). When the Solicitor General did so, the Supreme Court denied certiorari. U.S. . In the Ninth Circuit case, plaintiff relied heavily on the first opinion of this Court in this case and on the

tradicted line of cases that the federal courts will not interfere with the internal affairs of Indian tribes. Specifically the court so held as to the Navajos in *Native American Church v. Navajo Tribal Council*, 272 F.2d 131 (C.A. 10, 1959). In *Prairie Band of Pottawatomie Tribe of Indians v. Puckkee*, 321 F.2d 767 (C.A. 10, 1963), jurisdiction was denied over a controversy as to membership of the Tribe in order to share in its assets, especially an Indian Claims Commission judgment, the court saying that the suit "is an intra-tribal controversy, over which Federal court jurisdiction has been traditionally denied." See also *Martinez v. Southern Ute Tribe of Southern Ute Res.*, 249 F.2d 915, 920 (C.A. 10, 1957), cert. den., 356 U.S. 960; *Dicke v. Cheyenne-Arapaho Tribes, Inc.*, 304 F.2d 113 (C.A. 10, 1962). The *Pottawatomie* decision was re-affirmed in January 1966 in *Prairie Band of the Pottawatomie Tribe v. Udall*, F.2d (C.A. 10),⁸ characterizing the earlier opinion as stating "unequivocally that there is no federal jurisdiction to settle intra-tribal controversies which is exactly what this is."

The same is true here. Basically, the controversy is between those favoring the plaintiff and the Chairman and his adherents. It is simply a dispute between two agents of that entity, "the Navajo Tribe," i.e., the elected Chairman and its contractual attorney. Rather than disclaiming jurisdiction, the district court undertook to tell the Secretary how it [the court] thought the matter should be solved. It said (JA 2642B): "I sincerely believe that from this moment on if the Secretary instructs the Indian Bureau people to lay off Mr. Littell, he won't have a bit of trouble; * * *." These same ideas appear in the findings of fact, conclusions of law and opinion on the permanent injunction (JA 2627, 2628, 2683). The asserted affirmative control over behavior of Interior Depart-

opinion of the trial court as to contempt, the latter opinion being printed in full as an appendix to his brief (JA 2629).

⁸ Copies of this unreported opinion are being served herewith on counsel for plaintiff.

ment representatives at Council meetings is equally clearly attempted adjudication of intra-tribal affairs. The judgment goes further. It even orders the Secretary to violate plaintiff's contract, to disregard the authority over vouchers, and to take them from the officers of the Tribe "and to proceed, notwithstanding the provisions of said contract, to process such vouchers * * *" (JA 2683). Here the court asserts a power to override both the Tribal Code, defining the functions of its officers, and expressly plaintiff's contract, which it nevertheless insists everyone else is enjoined to follow, according to the court's construction of it. In short, tribal self-government and federal supervision exist only to the extent and in the manner to which the district court thinks they should.

This case well illustrates the reason of the rule which precludes court intrusion into intra-tribal affairs. The contempt opinion and the final opinion both express great weight given by the court to one witness, Annie Wauneka, a prime supporter of plaintiff. It says that in its years of experience the court doesn't "believe I have ever heard or seen a witness on the stand who made a better impression on this Court than that lady * * *" (JA 2642B). Again it refers to her "wisdom, honesty, sincerity and judgment" and that of plaintiff's supporter, McCabe, which, it says, "has greatly impressed the court" (JA 2628). It says "the Court finds from the evidence that the Tribal Council has the ability, knowledge and intelligence to handle its own affairs" (JA 2628). It must be remembered that the reservation is more than 2,000 miles from the district court, which is not shown ever to have visited it. It is, indeed, a slim basis for the court, impressed primarily by one witness, to adjudge the abilities of 72 other councilmen to withstand the pressures of those seeking to profit from its large resources.⁹ Annie Wauneka's impression

⁹ In contrast to the district court's opinion, based on the opinions of two Council members, the facts show that approximately 20 of the members of the Tribal Council cannot speak or understand more than simple English and only 25 to 40 of them have received

on the court in Washington, D. C., is, we submit, no basis at all for the finding as to the abilities of the entire Tribal Council. From the nature of things, such an issue is not susceptible to trial in the normal course of federal court proceedings and was, we submit, clearly beyond the jurisdiction of the court below. And, as we note shortly, enforcement of the injunction, especially in view of its ambiguity, would inject the court into continuous re-examination of the merits of tribal affairs in contempt proceedings. Congress has not empowered the federal courts so to supervise Indian tribal affairs.

D. *The judgment unwarrantedly seeks to control the discretionary authority of the Secretary of the Interior.*—As we have noted, Congress has granted to the Secretary, and to the Commissioner of Indian Affairs, the execution of the federal guardianship over Indian tribes. The discretionary exercise of authority by the Secretary is not subject to general review by the court and substitution of its judgment for the Secretary's as to the best method of solving problems. It was not for the court to order the Secretary to make the Chairman deal with the plaintiff. The court's proper function was stated last month in *Prairie Band of the Pottawatomie Tribe v. Udall*, F. 2d (C.A. 10, 1966), referring to 28 U.S.C. secs. 1361 and 1391(e), extending the mandamus jurisdiction of the court below to other federal district courts. "Historically, mandamus is an extraordinary remedial process awarded only in the exercise of sound judicial discretion. Before such a writ may issue, it must appear that the claim is clear and certain and the duty of the officer involved must be ministerial, plainly defined, and peremptory. *Huddleston v. Dwyer*, 10 Cir., 145 F.2d 311. The duty sought to be exercised must be a positive command and so plainly prescribed as to be free from doubt. *Wilbur v. United States ex Rel. Kadrie*, 281 U.S. 206." Referring to a

any formal education beyond the eighth grade of elementary school. Perhaps only one member of the Tribal Council is a college graduate and none is a lawyer.

statute in which Congress appropriated money to be used for a purpose authorized by the tribal governing body and approved by the Secretary, the court held, "Far from being ministerial, mere approval authority with nothing more appears highly discretionary."

Contrast the judgment here. Under 25 U.S.C. sec. 81, attorneys' contracts must bear the approval of the Secretary, and under Section 82 the Secretary and the Commissioner must determine in their judgment that the "contract * * * has been complied with." Nevertheless, the judgment, in paragraph III(3), undertakes to direct the procedure of processing plaintiff's vouchers, contrary to plaintiff's contract and to the Navajo Code defining the function of the tribal officers. The concluding phrase is "subject only to such review for sufficiency of form and substance as is required by the governing law and regulations" (JA 2683). See also paragraph II(4) of the judgment. If this does not narrow the Secretary's existing discretion, there is no reason to put it into an injunction. Its presence there can only lead to more disputes, like the contempt hearings, as to what actions the court thought the Secretary could take without violating the injunction.

Perhaps a more important and an explicit invasion of the Secretary's discretion are subparagraphs 1 and 2 of paragraph III of the injunction ordering all government agents "to recognize the plaintiff" as "the General Counsel and Claims Attorney" of the Tribe and (JA 2683) "to treat with, confer and negotiate with the plaintiff, Norman M. Littell, on the same footing as that which existed prior to April 13, 1963, on all occasions when it is customary or appropriate in the conduct of official intercourse or business with the Navajo Tribe of Indians to treat with, confer with, or negotiate with the General Counsel and Claims Attorney of the said Tribe; * * *."

This is remote from a ministerial duty. The treating with, conferring and negotiating is the highest order of discretionary function. Where is the "ministerial duty"

declared by statute? Where is it "plainly defined?" Where is it "peremptory?" What statute contains such a "positive command?" We elaborate further on the impossibility of enforcement of such personal relationships shortly, *infra*, p. 33. Here, we emphasize the complete absence of any jurisdiction of the federal courts affirmatively to direct such personal, discretionary activities of federal officers.

II

The District Court Lacked Jurisdiction Affirmatively to Coerce by Injunction Personal Services of an Attorney

Two vital principles of equity jurisprudence adopted as a matter of important policy have been violated here. First, the coercive powers of an equity court cannot be invoked to enforce a contract for personal services. In *Poultry Producers v. Barlow*, 189 Cal. 278, 208 Pac. 93, 97 (1922), it is stated that "the general rule is that a contract for service will not be specifically enforced, either directly by means of a decree directing the defendants to perform it, or indirectly by an injunction restraining him from violating it." The court there set forth the three frequently stated underlying reasons for this rule:

- (1) * * * [I]t would be an *invasion of one's statutory liberty* to compel him to work for, or to remain in the personal service of, another. It would place him in a condition of involuntary servitude. * * *
- (2) [I]n view of the *personal relation* that result from a contract of service, it would be *inexpedient*, from the standpoint of public policy, * * *. [W]here one of the contracting parties is to act as the confidential agent of the other, it is necessary, not only for the parties, but for the sake of society at large, that there should be entire harmony and a spirit of cooperation between the contracting parties. (3) [I]t is *inconvenient*, or * * * *impossible*, for a court of justice to conduct and supervise the operation inci-

dent to and requisite for the execution of a decree of specific performance of a contract which involves the rendering of personal services. (Underlining and numbering added.)

In addition, the court went on to say, "courts of equity will not decree the specific performance of contracts which by their terms stipulate for a succession of acts whose performance cannot be consummated by one transaction, but will be continuous and require protracted supervision and direction." See also, *Bethlehem Engineering Export Corp. v. Christie*, 26 F.Supp. 121, aff'd, 105 F.2d 933 (C.A. 2, 1939); *Shubert v. Woodward*, 167 Fed. 47 (C.A. 8, 1909); *Laurens v. Northern Iowa Gas and E. Co.*, 262 Fed. 712 (N.D. Iowa 1920); *Taussig v. Corbin*, 142 Fed. 660 (C.A. 3, 1906); *Adams v. Murphy*, 165 Fed. 304 (C.A. 8, 1908).

The second principle arises from the fact that the courts give contracts of attorneys far less protection and remedies than those of others. A client has the absolute right to discharge an attorney and end their relationship. This can be done at any time and for any reason. *Doggett v. Deauville Corp.*, 148 F.2d 881 (C.A. 5, 1945); *In re McCrory Stores Corporation*, 91 F.2d 947 (C.A. 2, 1937), cert. den., 302 U.S. 725; *Schwartz v. Broadcast Music*, 130 F.Supp. 956 (S.D. N.Y. 1955); *Casebolt v. Mid-Continent Airlines*, 85 F.Supp. 915 (D. Minn. 1949).

As was pointed out in *In re McCrory Stores Corporation* (p. 949):

By the New York law, under which the contract of employment was entered into, a client may discharge his attorney, at any stage of his employment, provided only the latter remains entitled to a quantum meruit for his services already performed. * * *

"That the client may at any time for any reason or without reason discharge his attorney is a firmly established rule which springs from the personal and confidential nature of the relation which such a contract of employment calls into existence * * *."

The rationale for this principle is that a client must have complete confidence in the ability and fidelity of his attorney. This is absolutely necessary for a harmonious relationship between them and for the attorney to properly carry out his functions. As the court in *Schwartz v. Broadcast Music, supra*, said (p. 957), "the right is a necessary incident of the lawyer-client relationship which, if it is to serve the client's interests, must at all times rest upon a foundation of mutual respect and confidence."

This principle was directly applied to Indian attorneys in *Adams v. Murphy*, 165 Fed. 304 (C.A. 8, 1908), where an Indian chief discharged the tribal attorney who brought a suit in equity seeking an injunction against the chief and a ruling that he is entitled to act as tribal attorney. The court of appeals reversed the lower court and held that the demurrer to the plaintiff's action should be sustained. One reason given for this reversal was that a contract for professional services cannot be specifically enforced. At page 311 it is stated:

Even if his (the chief's) conduct was arbitrary, it could produce no result except the violation of the contract, and could not justify a resort to equity either for the purpose of having the complainant reinstated in the employment, or enforcing payment of his salary. The relationship of attorney and client is such as to require perfect confidence between the parties, and, of course, could not be continued by a decree in equity against the will of either party.

The legal technicality that in theory plaintiff's contract is with that fictional body, "the Tribe," does not enlarge the right of the plaintiff to compel persons to deal with him as their attorney and advisor.¹⁰ Governments can only act through agents, hence coercion upon them in their official capacity is coercion of their government. *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 688 (1949).

¹⁰ The district court carries this fiction so far as to conclude that plaintiff's contract "could not be terminated by or at a tribal election, even if such an election had been a plebiscite."

The reason equity refuses to exercise its coercive powers applies with full force as to the Chairman. Plaintiff's function is to act as attorney and legal adviser to the Chairman. That is clearly contemplated by the contract. His employment was to furnish legal advice to the Chairman, the Advisory Committee, and the Council, not to that fictional entity called "the Navajo Tribe." As we have noted, *supra*, that entity only exists as a governing body because of the Secretary's regulations.

An intent by the injunction to coerce acceptance by the Chairman of the attorney's services of plaintiff is perfectly clear. Indeed, plaintiff goes so far as to assert that, because of the contract, the Chairman must consult plaintiff even if he secures legal advice elsewhere (JA 2683). And the court's order to the Secretary to treat, confer and negotiate with plaintiff as to Navajo affairs is coercing him and, through him, the Chairman to accept such personal services.

This equity will not do "directly" or "indirectly" (*supra*, p. 32). The personal and confidential nature of the attorney relationship clearly existed between plaintiff, the Chairman and the Secretary. Indeed, at the trial of this case, plaintiff's attorney sought to invoke the attorney-client privilege to prevent revelation of his files to the Secretary and the court.

In addition to the objection of enforcing a personal relationship where there should be "harmony and spirit of cooperation" (*supra*, p. 32), it will plainly be impossible for the court to supervise the rendering of the services. The contempt proceedings concerning conduct of one Council meeting is an obvious precursor of events to come. Since Nakai's inauguration as Chairman, plaintiff objected to many actions and to legal advice Nakai secured from others.

Especially in view of the vagueness of the injunction, it seems quite clear that those bound by the judgment (Nakai clearly is not) are under the pressure of facing contempt charges any time they disagree with plaintiff.

And the court will then have to undertake to decide, presumably as it did on the first contempt hearing, what it thinks would be for the best interests of the Tribe. "Continuous" and "protracted supervision and direction" (*supra*, p. 32) until the end of plaintiff's contract would obviously be required to enforce the injunction. These considerations apply with equal force to the injunction directing government officers "to treat with, confer and negotiate with the plaintiff" (JA 2683). What may be conformance to the decree is impossible to tell.

In summary, this judgment, and the record on which it is based, is one of the best proofs of the wisdom of the rules precluding the court from attempting by injunction to govern such matters. The absurdity of expecting the judgment to produce "perfect confidence between the parties" and "entire harmony and spirit of cooperation" is too obvious to need further proof. Finally, the general rule of equity is that there should be mutuality of remedy. Plaintiff would be the first to say that, if he did not choose to do so, he could not be forced to furnish his services as an attorney to the Chairman, the Advisory Committee or the Tribal Council.

III

The Secretary was Empowered to Withdraw His Approval of Plaintiff's Contract and then Terminate His Future Services

Although this subject was argued at length on the first appeal of this case, there is no discussion in the opinion of the relevant factors involved. Instead, there is merely the statement: "The Secretary can point to no statute applicable here which confers upon him any such authority" (JA 357). The fact is equally clear that the plaintiff can point to no statute denying the Secretary any such authority. This is, therefore, merely a statement of the circumstances that produces the controversy. It does not resolve it.

Any notion that every action taken by the Secretary of the Interior must be specifically authorized by Congress, even to its details, concerning Indian affairs, is exploded by decades of practice approved by the courts (see *supra*, p. 21). Here, the theory proves too much since the basic organization of the Tribe and the authority of the Chairman, the Advisory Committee, the Council, etc., rests not on statute but on Secretarial regulation (*supra*, p. 25).

All the relevant factors of statutory construction support the Secretary's power. As we have noted (*supra*, p. 21), the settled law is that in Indian affairs the Secretary has all powers not denied him by Congress. By its very language the statute is not a direct grant of authority to the Secretary of approval of contracts. Instead, it is a recognition of the existence of such power and establishes the procedural requirement that the approval be endorsed on the contract (*infra*, p. 59). The statute was designed to control white men's dealings with Indians and to implement, make explicit and enlarge the Secretary's powers, not to limit them.

Closely analogous is the Secretary's authority of public lands. In *Boesche v. Udall*, 373 U.S. 472 (1963), the issue related to the Secretary's authority to cancel administratively an oil and gas lease of public lands. The Court sustained the authority "under his general powers of management over the public lands" since the authority had not been explicitly withdrawn by Congress. The land patent cases were distinguished because the patent "divests the Government of title." 373 U.S. at p. 477. Here, like the oil and gas lease situation, approval of plaintiff's contract did not end the Secretary's duties and responsibilities in the matter. The duty of supervision of plaintiff's activities and performance persisted to the end of the contract. The Secretary's general powers of supervision over Indian-white relationships is comparable to his powers over federal lands. *Boesche* rejected an argument that Section 31 of the Mineral Leasing Act, dealing with cancellation

of oil and gas leases under some circumstances, precluded the administrative cancellation for reasons not covered by the section. The Court said (p. 481):

It would thus be surprising to find in the Act, which was intended to expand, not contract, the Secretary's control over the mineral lands of the United States, a restriction on the Secretary's power to cancel leases issued through administrative error—a power which was then already firmly established.

The same comment applies here, since Sections 81 and 82 were clearly intended to give the Secretary the broadest powers necessary to protect the Indians, particularly from attorneys. There is no warrant for reading those sections as limiting the Secretary's power.

Analogous cases in the Indian field confirm the view that a power to approve is not to be read literally as merely a power to approve or disapprove. Where the Secretary is authorized to consent to sales of Indian property, "The power to condition the consent or to prescribe the terms upon which it will be given is rather obviously implied." *United States v. Eastman*, 118 F.2d 421, 424 (C.A. 9, 1941), cert. den., 314 U.S. 635. "The authority of the Secretary to withhold his approval includes the lesser authority to give his approval upon condition that the royalties be thus conserved and protected." *Mott v. United States*, 283 U.S. 747, 751 (1931), and cases cited in footnote 4. Earlier, as to a timber contract, the Court said, *Starr v. Campbell*, 208 U.S. 527, 533 (1908):

We cannot yield to the contention that the consent of the President to the contract ended his authority over the matter. In other words, that he could put no condition upon it.

No reason appears here why the same principle does not permit the withdrawal of an approval earlier given, so far as the contract may be executory.

Existence of authority to withdraw approval is the only answer consistent with other provisions of the statute and

its legislative history. Under 25 U.S.C. secs. 81 and 82, control and supervision by the Secretary is not limited merely to approval of the contract. Under Section 82, payment of contract amounts cannot be made until sworn statements are given to the Commissioner of the services rendered and he determines that the contract has been fulfilled. The contractual provision which the Commissioner insisted upon, requiring his approval of various actions by plaintiff, as well as the 11 amendments, all of which required departmental approval (*supra*, pp. 6-7), well illustrate the continuing nature of the Secretary's supervision. No reason appears why that supervision can be exercised only by disapproval of suggested amendments and not by withdrawal of approval earlier given when circumstances require it.

The legislative history contradicts any such limitations on the Secretary's authority. This was a remedial statute designed to correct grave abuses and it should be enforced accordingly.¹¹ In 1872, the House Committee on Indian Affairs conducted an investigation of Indian-white relationships and produced a report highly critical of attorneys and agents. The Committee reported the general conclusion that (H. Rept. No. 98, 42d Cong., 3d sess. (1873), p. 2, Cong. Doc. Ser. No. 1578):

Great frauds and wrongs have been committed with impunity in the past by means of exorbitant and fraudulent contracts for nominal services as attorneys, obtained by persons more or less familiar with the management of the Indian Office, either as agents or attorneys, with which the Indians were the sufferers, and which have caused much bad feeling and distrust between them and our Government and

¹¹ In *S.E.C. v. Capital Gains Bureau*, 375 U.S. 180 (1963), the Court said (p. 195):

Congress intended the Investment Advisers Act of 1940 to be construed like other securities legislation "enacted for the purpose of avoiding frauds," not technically and restrictively, but flexibly to effectuate its remedial purposes.

The same approach should be taken here.

people, and greatly retarded the progress of the Indians in a civilization that they doubted. In fact, the investigation made by the committee shows that there has continually been, and now is, a class of avaricious and unprincipled claim-agents and middlemen, who, for selfish purposes, defeat the mutual interests of the Government, our people, and the Indians, and plundering both the Government and the Indians, disgrace the nation and our civilization, and discourage and madden the Indian, destroying in him the hope of justice and a faithful observance of our agreements, made in treaties on the part of the United States with them.

The 1873 report recognized that nothing could be done about contracts that had been consummated. However, the committee thought otherwise, not merely as to contracts to be made in the future, but as to contracts that had been "entered into and not yet closed up by the full settlement of the subject matter of the agreement." H. Rept. No. 98, 42d Cong., 3d sess. (1873) p. 3, Cong. Doc. Ser. No. 1578. Describing the effect of the 1872 Act, now 25 U.S.C. secs. 81 and 82, and its purposes, the committee said (*Id.*, p. 9):

Business contracts made between shrewd and intelligent white men and Indians should be held strictly against the white men, to their full performance of their duties under, and to an entire equitable adjustment of such contracts, when not *exorbitant or fraudulent*, and should be *annulled where exorbitant*, and restitution made in all cases where moneys have been paid under them more than an equitable adjustment would justify. And such contracts, *when fraudulent*, should be declared null and void from the beginning, and all moneys, or other values paid under them, with interest and damages, should be required of those connected with the fraud and full restitution compelled. [Emphasis in original.]

In more recent times, a Senate investigation resulted in a report which was likewise critical of the activities

of many attorneys dealing with the Indian tribes. The report referred to that of 1873 and commented, "The tribal-attorney relations uncovered in the report of that House committee are singularly applicable to the situation uncovered by this subcommittee some 80 years after its publication." S. Rept. No. 8, 83d Cong., 1st sess. (1953) p. 2, Cong. Doc. Ser. No. 11659.

This report makes it very clear that close supervision and control of all activities of the attorneys for Indian tribes are entirely appropriate. Many of these controls in recent years relate to claims under the Indian Claims Commission Act and otherwise. Supervision of the Navajo matter is even more important since it involves not only claims for money or property but the day-to-day operation of an area larger than many states of the Union. To prevent disruption of the administration of the reservation and to protect the Tribe from over-reaching, etc., by attorneys, the Secretary plainly has authority and the duty to investigate the attorneys' actions and to take any appropriate action.

The existence of an authority in the Secretary of the Interior to withdraw his approval and annul the contract is assumed to exist in the Act of June 26, 1936, 49 Stat. 1984, 25 U.S.C. sec. 81a, confirming attorneys' claims contracts approved prior to June 26, 1936, with indefinite times of duration, with the proviso "That nothing herein contained shall limit the power of the Secretary of the Interior, after due notice and hearing and for proper cause shown, to cancel any such contract or agreement." This cannot be reconciled with the claimed absence of power to cancel such contracts.

Plaintiff has argued that the proviso of the 1936 Act, 25 U.S.C. sec. 81a, refers only to the Secretary's power to cancel on the ground that the contracts failed to have a fixed time as required by Section 81. But the first part of Section 81a provides that the stated contract provisions "shall be deemed as sufficient compliance with Section 81 of this Title." The proviso:

That nothing herein contained shall limit the power of the Secretary of the Interior, after due notice and hearing and for proper cause shown, to cancel any such contract or agreement.

necessarily refers to cancellation for some reason other than the condition which Congress waived. It is absurd to say, as does plaintiff, that the proviso preserved to the Secretary a power to cancel for a single specific reason, while Congress, in the very same Act, declared the contracts valid so far as that objection was concerned and thus denied the Secretary the power to cancel for that reason. Rather than discriminating between grounds of cancellation, Congress recognized power to cancel for any valid reason. Plaintiff would simply read the proviso out of the statute.

IV

Regardless of Limits on the Court's Power, Plaintiff is not Entitled to Invoke the Equitable Relief Granted by the Judgment

A. *The district court abused its discretion in coercing, in every way possible, the Chairman of the Tribe to accept plaintiff as his attorney for all official purposes.*— Even if the court might in some circumstances have the power, we submit that, even apart from the specific charges which we believe to have been fully proven, the conduct of plaintiff is such that the court abused its discretion in forcing the Chairman to use plaintiff as his lawyer on tribal affairs. The reckless nature of the press release purporting to declare what this Court decided and attacking the dissenting judge (JA 1971); of charges concerning *Littell v. Nakai*, *supra*, fn. 7, which imply that the Assistant Attorney General and the Solicitor General were induced to take wrong positions because of pressure from the Secretary;¹² and of plaintiff's charges

¹² Findings 96, 97 and 98 (JA 2669) deal with the *Nakai* case without demonstrating any possible relevancy they could have to plaintiff's case.

against the Secretary, his subordinates, and against reputable attorneys were not supported by the evidence and were completely disproved. The testimony of plaintiff here (JA 1343 *et seq.*) is not that of a dispassionate lawyer in whose advice the Chairman could have confidence.

B. *Plaintiff's actions concerning the three matters given as cause for terminating his contract disqualify him from securing equitable relief.*—Even assuming that in some circumstances an equity court might accord an attorney coercive relief to enforce his right to act as an attorney, the "clean hands" principle certainly requires that, to qualify for such support, the attorney's actions must be clear of any basis of criticism. Here the charge that plaintiff had violated his contract and had been guilty of unfair dealing which tended to his profit, at the expense of the Tribe, was sustained by the evidence and in part by plaintiff's own admission.

No doctrine is more fundamental than: "He who comes into equity must come with clean hands." See, generally, Pomeroy, *Equity Jurisprudence* (5th ed. 1941) secs. 397-404. It is also axiomatic that contracts between an attorney and his client made during the existence of the fiduciary relationship are subjects of jealous scrutiny by the courts whenever called into question. *Ridge v. Healy*, 251 Fed. 798 (C.A. 8, 1918), Anno. 19 A.L.R. 847.

Both of these doctrines are peculiarly applicable in this case. If a man's hands must be clean to qualify him for relief in equity ordinarily, then indeed they must be immaculate if he is to be awarded enforcement in equity of an attorney contract—a species of agreement so suspect by the law as to be deemed presumptively fraudulent. In *Ridge v. Healy*, 251 Fed. 798 (C.A. 8, 1918), the court said (p. 814):

[I]t seems clear that error was committed in overlooking the important fact that this fee contract was made between [plaintiff attorney] and [defendant client] while the relation of attorney and client existed between them, and therefore was presumptively

invalid, and also in assuming, though not directly holding, that the burden was upon the defendant to show inequity or unfairness in the fee contract, or in the results under it, instead of requiring the plaintiffs to sustain the burden of proving that the fee contract was fair and equitable in its terms, and that the result of enforcing the same would also be fair and equitable.

See also *Strickler Engineering Corp. v. Seminar, Inc.*, 122 A.2d 563 (C.A. Md. 1956); *Spilker v. Hankin*, 88 U.S. App.D.C. 206, 188 F.2d 35 (1951). In connection with clean hands, the Supreme Court has said in *Precision Co. v. Automotive Co.*, 324 U.S. 806 (1945), at pp. 814-815:

The guiding doctrine in this case is the equitable maxim that "he who comes into equity must come with clean hands." This maxim is far more than a mere banality. It is a self imposed ordinance that closes the doors of a court of equity to one tainted with inequity or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be "the abetter of inequity." *Bein v. Heath*, 6 How. 228, 247. Thus while "equity does not demand that its suitors shall have led blameless lives," *Loughran v. Loughran*, 292 U.S. 216, 229, as to other matters, it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue.

1. *The history of the contract and performance under it.*—To understand the deviations from the contract, a short review is necessary.

The facts established, and the trial court found, that the plaintiff first became the General Counsel and the Claims Attorney for the Navajo Tribe in 1947. His contract employing him as General Counsel and Claims Attorney was approved by the Tribal Council, the governing

body of the Tribe, and by the Secretary of the Interior (JA 2643).

When the 1947 contract was about to expire, an interim agreement was entered into by the plaintiff and the nine-man Advisory Committee—not the 74-man Tribal Council. That interim agreement extended the terms of the 1947 contract until a new contract could be agreed upon, executed and approved. The interim agreement was never approved and presumably never submitted by the Secretary of the Interior (JA 1262).

While the interim agreement was in force, the plaintiff negotiated with the Chairman of the Tribal Council, then one Paul Jones, and with members of the nine-man Advisory Committee who were selected by Paul Jones and hand-picked by him, just as were the nine members of the Advisory Committee who were selected by Nakai when he became Chairman in 1963.

These negotiations, leading to the preparation of the 1957 contract, were carried on in meetings of the Advisory Committee and, although the minutes of those meetings were recorded, those minutes were not published nor were they distributed to the Tribal Council or to the Tribe generally. The fact is those minutes did not come to light until November 1963 after the Secretary commenced his investigation into the conduct of plaintiff's activities (JA 1265).

The 1957 contract, which was finally agreed upon by the plaintiff, the Chairman and the Advisory Committee, was executed by the Chairman of the Tribal Council on October 8, 1957 (JA 35). The then Secretary of the Interior approved it pursuant to 25 U.S.C. sec. 81. However, the 1957 contract contained a number of departures and deviations from the 1947 contract which were never considered or debated by the Tribal Council. The Tribal Council had not been furnished with copies of the minutes of the meetings of the Advisory Committee in September 1957. It was ignorant of the changes and the reasons for such changes.

Among the more important deviations from the 1947 contract, the 1957 contract contained the following:

(a) The 1947 contract contained no specific provision authorizing an increase in plaintiff's salary. However, by action of the Tribal Council, he was earning \$15,000 under that contract at the end of its 10-year term. In the 1957 contract (JA 38), the General Counsel's salary was raised from \$15,000 to \$25,000, with the provision that compensation of the attorneys could be increased "by providing in the Tribal Budget for any such increase" (JA 40). At the insistence of the Advisory Committee, this part of the contract contained a stipulation that there would be no change in the compensation of Mr. Littell and Mr. Alexander during the first five years (JA 40).

(b) The 1947 contract (par. 12) provided for termination of the entire contract for "good cause" by the Commissioner of Indian Affairs with the consent of the two-man Navajo Tribal Council Committee (which committee was apparently never appointed) and for termination of the general counsel features of the contract, after five years, by the Commissioner of Indian Affairs at the request of the Indian Tribe (JA 27). The 1957 amended contract (par. 12) provided for termination by the Tribal Council for good cause after 60 days' notice with the approval of the Commissioner of Indian Affairs (JA 12).

(c) The 1957 contract added the provision appearing at JA 42 which permitted the plaintiff "In respect to any claim which may hereafter be prosecuted on behalf of the Tribe for recovery of lands" to elect to take either 10 percent of the value of the property recovered or a percentage of bonuses, royalties or other incomes from that property in an amount to be agreed upon between the parties, but not to exceed one percent of such royalties or bonuses. This provision was approved by the Advisory Committee only after extended discussion. This amended provision, however, continued to relate only to claims against the United States and did not contain any refer-

ence to general litigation or claims against other tribes.

(d) The new contract added a provision (JA 38) authorizing the General Counsel to report to the Tribal Council when, in his opinion, the interest of the Tribe so required.

(e) The 1957 contract specifically declared that two of the attorneys named therein should function only as general counsel attorneys, with a provision that these attorneys could participate in claims cases when directed to do so by the General Counsel with the approval of the Advisory Committee and the Commissioner of Indian Affairs (JA 39).

As discussed shortly, some 11 amendments were made to the contract. The ordinary procedure for so amending the Navajo attorney contract was as follows: When a change in the agreement was desired by plaintiff, initial discussions with the Advisory Committee took place; then a resolution was proposed to the Tribal Council; if it approved the proposal, the Council passed a resolution to that effect; plaintiff or his subordinates then drafted an amendment to the contract which was executed either by the Chairman or the Advisory Committee and forwarded to the Department of the Interior; the final step was approval, suggestion of conditions, or disapproval by the Department of the Interior.

2. *Use of general counsel attorneys on claims cases.*—The three attorneys who were parties to the original 1947 contract, including plaintiff, were to be engaged upon both general counsel and claims work. The 1957 contract, however, with attorneys Littell, Alexander, Davis and Huerta, provided that the two latter were to perform only general counsel services unless the General Counsel should otherwise direct, with the approval of the Advisory Committee and the Commissioner of Indian Affairs. The portions of the contract relating to compensation for claims services referred only to attorneys plaintiff and Alexander.

Thus, a new situation was created, that is, where certain new attorneys were employed by the Tribe solely for general counsel services. This was primarily to plaintiff's advantage because it meant simply that the Tribe had additional attorneys for tribal work who ordinarily would have no right to share any claims case awards. Obviously, the use of those attorneys by plaintiff on his claims cases—and to the amount of time involved—deprived the Tribe of services for which it had paid and gave plaintiff an emolument or, more practically speaking, a free ride in the conduct of legal work, to which he was not entitled and for which he would be contingently compensated.

The evidence established, and the trial court found as a fact, that the plaintiff had directed general counsel attorneys to work on claims cases over a period of time and their work consisted of, among other things, preparing briefs, memoranda, handling correspondence and attending hearings on claims cases. The court found that the manner in which that work was accomplished by the general counsel attorneys was not in accordance with the terms of the 1957 contract and its amendments, and that the plaintiff had never requested the approval of the Advisory Committee or the Commissioner of Indian Affairs (JA 2659).

Admitting continued breaches of the contract, the district court held that they made no difference because the Tribe had another remedy, i.e., set-off of the illegal payments sometime in the future when plaintiff should file his bill for claims work (JA 2677). But certainly the availability of some other remedy for plaintiff's breach of his contract does not alter the fact that there was a breach of the contract which, since it defines the duty of an attorney, is also a breach of trust. Many disciplined or disbarred lawyers have relied upon just such a defense in offering restitution where they have been shown, for example, to have done no more than commingle funds.

Misappropriation of a client's funds or property by an attorney is a frequently cited reason for disbarment or suspension of an attorney. *Ohio State Bar Ass'n. v. Gray*, 1 Ohio St.2d 97, 204 N.E.2d 683 (1965); *The Florida Bar v. Enwright*, 172 So.2d 584 (1965); *Memphis and Shelby County Bar Ass'n. v. Sanderson*, 52 Tenn. App. 684, 378 S.W.2d 173 (1963); *State ex rel. Oklahoma Bar Ass'n. v. Hood*, 406 P.2d 978 (1965); *People ex rel. Black v. Smith*, 290 Ill. 241, 124 N.E. 807 (1919).

As early as 1899, the court in *Colo. Bar Ass'n. v. Betts*, 26 Colo. 521, 58 Pac. 1091, 1093, emphatically declared:

* * * no circumstances in which an attorney may be placed will warrant him in appropriating for his personal use the funds of his client. * * *

The importance for an attorney to avoid any conduct which has even the slightest taint of unfair dealing was pointed out in *People ex rel. Black v. Smith*, 290 Ill. 241, 124 N.E. 807, 811 (1919):

No office offers greater opportunity for honorable service than that of attorney at law. To the great privilege conferred on a man given leave to practice this high calling there is added the equally great responsibility of upholding the ideals of the learned lawyers of earlier days. Into the hands of the lawyer are intrusted the property of the citizen, the savings of the widow, the inheritance of the helpless orphan, and the life of the unfortunate man. The only guaranty that this trust will be honorably executed is the character of the lawyer. Character can only be judged by reputation and conduct. When a lawyer so conducts himself that confidence can no longer be placed in him with safety, his usefulness to the court and state has ceased.

The court went on to conclude, "Other offences might be excused, but conversion to his own use of the property of his client is an offense that cannot in any degree be countenanced." (Emphasis added.)

The fact that there was no loss to the client, or that there was settlement, will not prevent disciplinary proceedings for breach of professional duty. *In Re Schatz*, 277 App.Div. 51, 97 N.Y.S.2d 902 (1950); *Coviello v. State Bar*, 45 Cal.2d 57, 286 P.2d 357 (1955). "Where attorneys have mingled their client's money with their own and have used it for their own purposes, even though, as in this case, settlements were thereafter made with their clients, particularly pending investigations concerning their acts, courts have repeatedly held that such conduct requires at least suspension of the attorney for a period commensurate with the wrongdoing." *Bar Association of San Francisco v. Cantrell*, 49 Cal.App. 468, 193 Pac. 598, 599 (1920). A comparable situation was involved in *People v. Board of Review of Cook County*, 351 Ill. 206, 184 N.E. 332 (1932), where attorneys were disbarred or disciplined for accepting salaries from the Sanitary District of Chicago which they had not earned. This case is not substantially different where general counsel attorneys were overpaid by the plaintiff so far as tribal work was concerned because their activities were directed to work for the plaintiff individually on claims matters. Moreover, the remedy of a set-off sometime in the indefinite future when plaintiff, or his successors, may present his bill for claims may well be inadequate. The offset places on the client the burden of proving the extent of the attorney's misconduct and the amount of resulting damage. Evidence may disappear by lapse of time. We submit that such an admitted dereliction should not be condoned by the courts.

3. *Unauthorized increase in plaintiff's compensation.*— Paragraph 4(a) of the 1957 contract stated (JA 29):

PROVIDED FURTHER that there shall be no change in the compensation of Mr. Littell and Mr. Alexander during the first five years of this contract.

Nevertheless, an increase of plaintiff's compensation of \$10,000 to \$35,000 was obtained in slightly less than four years, in June 1961. On its face, this was another clear

violation of the contract and breach of trust to plaintiff's advantage.

Plaintiff and the court justify this action on the ground that the increase was accomplished by Amendment No. 9 to the contract, which was approved by the Tribal Council and the Department, so that it had the legal effect of repealing the express proviso of the 1957 contract. We need not argue whether this is good law. The fact is that neither Amendment No. 9, nor the resolution authorizing it, refer to the proviso or purport to repeal it. The resolution, thus, failed to inform the Tribal Council that it was so repealing the proviso. And there is nothing to show that it was otherwise so informed. This concealment eliminates any implied repealer effect Amendment No. 9 might have and likewise, we submit, shows clear breach of trust.

This lack of disclosure, of itself, is a violation of plaintiff's fiduciary duty, debarring him from securing the relief the judgment gives him. In *In Re Chopnak*, 43 F. Supp. 106 (E.D. N.Y. 1941), an attorney, by supplemental agreement with a client of limited knowledge of English, secured a raise in his contingent fee from 40 percent to 50 percent. The court suspended the attorney, stating (p. 108):

* * * it was [the attorney's] duty in dealing with his client to make sure that the client *knew* that, in signing the retainer, he was agreeing to pay [the attorney] an increased fee. * * * (Emphasis added.)¹³

Plaintiff's failure to disclose, either to the Navajo Tribe or to the Secretary, all relevant facts regarding the recommendation for amendment of his 1957 contract is unquestionably grounds upon which that contract may be voided. *Globe Steel Abrasive Company v. National Metal Abrasive Company*, 101 F.2d 489, 491 (C.A. 6, 1939).

¹³ The attorney did not, in fact, secure payment on the 50 percent basis but rather was awarded the reasonable value of his services.

The duty to disclose is a positive one, and silence where disclosure is required may be equally fraudulent. The Secretary testified that he would not have approved plaintiff's increase if it had been disclosed to him that it violated the contract. The requirement of disclosure is stated in Williston, *Contracts* (1937) sec. 1499, as follows:

In case a fiduciary relation exists between the parties as that of trustee and *cestui que trust*, guardian and ward, attorney and client, there is a positive duty to disclose a failure to observe which is constructively fraudulent; * * *. In many cases where the silence of a party is not such as to amount to actionable fraud or to justify rescission of the contract, a court of equity will, nevertheless, refuse to enforce specific performance of the contract, since this relief is in many cases denied where the bargain is inequitable even though legally enforceable.

See also *Stuart v. Wyoming Rancho Company*, 128 U.S. 383, 388 (1888); Restatement of Contracts, secs. 471(c) and 472(1)(b) (1932).

Full disclosure of an attorney to his client is required not only at the outset or at the establishment of the attorney-client relationship, but also at each step during which the contract may be amended. It is well-established that, once the attorney-client relationship has been established, the fiduciary responsibility arises so that any alteration of the employment contract between attorney and client will be scrutinized very closely to determine whether or not there has been a breach of the fiduciary relationship. *United States v. Stringer*, 124 F.Supp. 705, 714 (D. Alaska 1954), rev'd on other grounds; *Spilker v. Hankin*, 88 U.S.App.D.C. 206, 188 F.2d 35 (C.A. D.C. 1951).

Finally, it is noteworthy that there is nothing to show substantial change in plaintiff's duties between 1957 and 1961, which could not have been anticipated, so as to warrant repeal of the five-year limitation with a 40 percent increase.

4. *The Healing v. Jones matter.*—Under the contract, claims against the United States are paid for on a contingent fee basis, the Tribe paying expenses, and obviously is important when vast areas containing mineral wealth are involved. The sole issue in *Healing v. Jones* was a matter of determining what particular land in a two and one-half million acre tract in Arizona had been granted to the Hopi Indians by the United States and what particular part of that area had been given to the Navajos. When the various Secretaries of the Interior were unable to decide upon a fair and equitable solution, Congress passed the Act of July 22, 1958, 72 Stat. 403. That Act attempted to accomplish two purposes:

First, it converted the entire area into a "trust" area for the benefit of whatever Indians might be ultimately held to be the owner. It was a recognition by Congress that either the Navajos or the Hopis were entitled to the area in question, but that very fact removed any possibility that either Tribe conceivably could have a claim against the United States in that connection.

Secondly, the Act authorized the two Tribes and the Attorney General, on behalf of the United States, to institute or defend a proceeding in the United States District Court for the District of Arizona to quiet title in the Tribes to such lands as they may be entitled. To that end, the case of *Healing v. Jones* was instituted by the Hopis against the Navajos and the United States. The United States challenged the jurisdiction of the court, but this was overruled. *Healing v. Jones*, 174 F.Supp. 211 (D. Ariz. 1959). Thereafter it occupied the position of a stakeholder, and the case went to judgment which awarded several hundreds of thousands of acres to each Tribe and an area to be occupied in common. *Healing v. Jones*, 210 F.Supp. 125 (D. Ariz. 1962), aff'd, 373 U.S. 758 (1963).

On its face this would appear to be simply a claim against another Indian tribe and not one against the United States to recover that which the United States de-

nies belongs to it and claims for itself. It is clearly far from the usual claim against the United States asserted in the Court of Claims or before the Indian Claims Commission. Nevertheless, while the action was pending, a resolution was presented to the Navajo Tribal Council on February 22, 1962, to authorize the employment of Mr. Leland Graham for general counsel and claims service. That resolution also provided for an increase in the salary of one Robert J. Waltham, then employed by the Tribe, and the resolution authorized the Chairman of the Tribal Council to submit to the Commissioner of Indian Affairs "an amendment to the said attorney contract accomplishing the foregoing purposes."

Purportedly in compliance with the resolution, Amendment No. 11 was then drafted and submitted to the Advisory Committee and to the Department by plaintiff or his staff. However, the amendment did not end with the coverage of the employment of Graham and the increase for Waltham as authorized, but plaintiff added to it the remarkable language which appears at JA 103, purporting to add *Healing v. Jones* and another matter, the Utah School Section issue, to the category of expressly designated claims cases. That change was never discussed with the Tribal Council or even with the Advisory Committee at the time.

Clearly, there were in the transaction three breaches of trust, i.e., (1) in attempting to build a record upon which to justify assertion of a contingent fee of probably six figures as a minimum, (2) in failure to make full disclosure to the Tribal Council and (3) in obtaining an amendment contrary to the prescribed procedure, i.e., without a specific Tribal Council authorizing resolution. The justification given by the district court for its condoning of such breaches clearly lacks merit.

First, the court says it does not have to decide whether *Healing v. Jones* was in fact a claims case since plaintiff has not yet asserted such a claim. Why that has not been asserted does not appear, even though the judgment

became final, when the Supreme Court summarily affirmed it, 373 U.S. 758, rejecting plaintiff's appeal. The fact that, in view of subsequent events, the breaches of trust may not have accomplished plaintiff's purposes does not alter the fact they were breaches.

Second, the court says that no authorizing resolution was necessary because, if it was a claims case under the contract, the amendment was unnecessary. But it was plaintiff who sought the amendment and who vigorously protested when the then Solicitor first rejected it (JA 2043). The only purpose could have been to build a record to support plaintiff's attempt at a large contingent fee.¹⁴ The breach of trust, especially involving lack of full disclosure, cannot be condoned or forgotten because it might have been unnecessary.

Finally, the court says this was a debatable question on which lawyers might differ. At the very least, the attorney's obligation was to disclose fully to the Tribe the fact that it was debatable, the basis on which it was debatable and the results of one action or another. There is not one word of disclosure to the Tribal Council that a lawyer could contend that plaintiff had already been paid for his services in *Healing v. Jones*.

And passing all the technicalities as to whether it is or is not a "claims case" within the meaning of the contract, there is not one word to show any substantial service rendered by plaintiff in prosecuting some claims against the United States, which it denied, rather than against the Hopi Tribe. No substance is shown to distinguish this from, for example, claims of the states involved in *Arizona v. California*, 373 U.S. 546 (1963), which plaintiff is paid for by the general counsel retainer.

¹⁴ It is noteworthy that, at the time of the approval of the amendment, July 1962 (JA 107), the trial judgment had been entered and only the Supreme Court proceedings, which ended a year later (see 373 U.S. 758), remained. And in his report to the Tribal Council in April 1963, *Healing* was not designated as a claims case (JA 199). Instead, it was listed as litigation along with other cases plainly included in the general counsel category, like *Warren Trading Post v. Tax Comm'n*, 380 U.S. 685 (1965).

5. *The departmental approval of the amendments to the contract does not immunize the plaintiff from responsibility for his breaches of trust.*—Plaintiff and the court make much of the approval of Department representatives secured by plaintiff to the contract, and its various amendments. The fact is that there was not full disclosure and the approvals were founded on inadequate investigation because of trust and confidence in the plaintiff. It is pure boot-straps for plaintiff to say that he succeeded in getting the approval; therefore, his actions are conclusively proper. Indeed, as *Seminole Nation, supra*, p. 26, shows, if the Department failed in its duty, it would render the United States liable to the Tribe as a whole. Certainly it can correct its mistakes, when they are discovered, before the damage is done. Cf. *Boesche v. Udall*, 373 U.S. 472 (1963). This case goes much further where there was imposition and lack of disclosure on the part of the plaintiff.

V

Many Findings of Fact are Erroneous Because of Mistakes of Law or Lack of Support in the Evidence

The errors above have been discussed without listing many of the objectionable findings. However, to avoid an argument that points have been waived under Rule 17(g) of this Court, we now state, in summary form, the findings to which objection is made. The following findings (JA 2643) are either erroneous, misleading, or irrelevant in whole or in part because they are based on the mistaken notion that the supreme authority is the Navajo Tribal Council: Findings 36, 62A, 68, 118; Conclusion No. 4. Finding 9 is misleading in its reference to the Advisory Committee as a "stacked body" and the change in its constitution in 1964 is irrelevant here. It was no more "stacked" than is the President's cabinet. Finding 12, that Nakai wanted Schifter to become the new General Counsel, is not supported by substantial evi-

dence. Finding 20 erroneously assumes the legal conclusion that waiver of sovereign immunity of the Tribe by a contract was a substantial danger when, as plaintiff knew, only Congress could waive such immunity. The last sentence of Finding 21 is not supported by substantial evidence. Finding 55 is not supported by evidence and is misleading in assuming that the Department had cause to doubt plaintiff's conduct in 1961, as it did in 1963. Finding 58 is not a fact but a legal conclusion (actually erroneous, see *supra*, p. 53). Finding 62 is argument, not fact, and is fallacious, since it is simply a matter of which breach of trust plaintiff committed, i.e., either *Healing v. Jones* was not a claims case, or general counsel attorneys were diverted from the work they were paid for. Plaintiff cannot have it both ways. Finding 68 is not supported by evidence and contains argument that "it is reasonable to conclude" which is erroneous. Finding 72 is not supported by evidence and is irrelevant argument. Finding 75, concerning a different attorney's contract with a different tribe, is completely irrelevant here. Findings 76 and 78 are not fact and are argumentative. Findings 80 and 81 are conclusions which, we submit, are erroneous in view of the now known facts. Findings 82 to 107 are irrelevant to the basis of plaintiff's action. Finding 92, as to the understanding of the Council, is conclusion, not fact, and is unsupported by substantial evidence. Finding 103 is a conclusion, not fact, and is erroneous. Finding 107 is a conclusion, totally unsupported by any evidence. Finding 113 is erroneous because the regulations cited do not apply to the Navajo Tribe. Findings 115 and 116 are vague conclusions as to motives of unnamed government employees and are without support of substantial evidence. Finding 118 concerns a matter which was not proper for finding by the court and is clearly erroneous as applied to the Tribal Council. In addition to the discussion above (p. 29), plaintiff's testimony shows communication was difficult and that the Navajo language did not even contain words

for certain concepts. Obviously the measure of what would be a "claims" case under the contract would be far beyond Navajo concepts.

CONCLUSION

For the foregoing reasons, the judgment appealed from should be reversed.

Respectfully submitted.

EDWIN L. WEISL, JR.,
Assistant Attorney General.

ROGER P. MARQUIS,
HERBERT PITTLE,
THOS. L. McKEVITT,
*Attorneys, Department of Justice,
Washington, D. C., 20530.*

FEBRUARY 1966

APPENDIX

The Act of June 17, 1957, 71 Stat. 157, 5 U.S.C. sec. 485, provides:

The Secretary of the Interior is charged with the supervision of public business relating to the following subjects and agencies:

* * * *

10. Indians.

* * * *

R.S. sec. 463, 25 U.S.C. sec. 2, provides:

The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.

R.S. sec. 2103, as amended by the Act of August 27, 1958, 72 Stat. 927, 25 U.S.C. sec. 81, provides:

No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:

First. Such agreement shall be in writing, and a duplicate of it delivered to each party.

Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

Third. It shall contain the names of all parties in interest, their residence and occupation; and if made with a tribe, by their tribal authorities, the scope of authority and the reason for exercising that authority, shall be given specifically.

Fourth. It shall state the time when and place where made, the particular purpose for which made, the special thing or things to be done under it, and, if for the collection of money, the basis of the claim, the source from which it is to be collected, the disposition to be made of it when collected, the amount or rate per centum of the fee in all cases; and if any contingent matter of condition constitutes a part of the contract or agreement, it shall be specifically set forth.

Fifth. It shall have a fixed limited time to run, which shall be distinctly stated.

All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or any one else, for or on his or their behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid.

R.S. sec. 2104, 25 U.S.C. sec. 82, provides:

No money shall be paid to any agent or attorney by an officer of the United States under any such contract or agreement, other than the fees due him for services rendered thereunder; but the moneys due the tribe, Indian, or Indians, as the case may be, shall be paid by the United States, through its own

officers or agents, to the party or parties entitled thereto; and no money or thing shall be paid to any person for services under such contract or agreement, until such person shall have first filed with the Commissioner of Indian Affairs a sworn statement, showing each particular act of service under the contract, giving date and fact in detail, and the Secretary of the Interior and Commissioner of Indian Affairs shall determine therefrom whether, in their judgment, such contract or agreement has been complied with or fulfilled; if so, the same may be paid, and, if not, it shall be paid in proportion to the services rendered under the contract.

Section 1 of the Act of August 26, 1936, 49 Stat. 1984, 25 U.S.C. sec. 81a, provides:

Any contracts or agreements approved prior to June 26, 1936, by the Secretary of the Interior between the authorities of any tribe, band, or group of Indians and their attorneys for the prosecution of claims against the United States, which provide that such contracts or agreements shall run for a period of years therein specified, and as long thereafter as may be required to complete the business therein provided for, or words of like import, or which provide that compensation for services rendered shall be on a quantum-meruit basis not to exceed a specific percentage, shall be deemed a sufficient compliance with section 81 of this title: *Provided, however,* That nothing herein contained shall limit the power of the Secretary of the Interior, after due notice and hearing and for proper cause shown, to cancel any such contract or agreement: *Provided further,* That the provisions of this section and section 81b of this title shall not be construed to revive any contract which has been terminated by lapse of time, operation of law, or by acts of the parties thereto.

1 - 43
BRIEF FOR APPELLEE

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,725

STEWART L. UDALL, Secretary of the Interior, *Appellant*,

v.

NORMAN M. LITTELL, *Appellee*.

Appeal From the United States District Court
for the District of Columbia

United States Court of Appeals

for the District of Columbia Circuit

FILED MAR 14 1966

Nathan J. Paulson
CLERK

FREDERICK BERNAYS WIENER,
1750 Pennsylvania Avenue, N.W.,
Washington, D. C. 20006,

JOHN F. DOYLE,
206 Southern Building,
Washington, D. C. 20005,

Attorneys for the Appellee.



QUESTIONS PRESENTED

In appellee's opinion, the questions presented by this appeal are:

1. Whether this Court was correct in its holding on the first appeal that the Secretary of the Interior has no power to cancel administratively an Indian contract already approved under R.S. § 2103.

2. Whether an injunction forbidding the Secretary of the Interior to terminate administratively an approved Indian contract, on the footing that he lacked power to do so and was in consequence tortiously interfering with a contractual relationship, is properly subject to the objections that such injunction interferes with Federal supervision over Indians, involves specific performance of a contract for personal services, and interferes with the other party's internal affairs, where such other party neither chose to terminate the contract nor was a necessary party to nor joined in the injunction proceeding.

3. Whether the district court was correct in concluding that the charges made by the Secretary were without foundation in law or in fact, that they would not have justified termination of the contract in any event, and that the appellee, who "at all times represented his client competently, faithfully, loyally and honestly * * * was entitled to better treatment and consideration * * * than he received," treatment characterized by the district court as "brutal and shabby."

4. Whether the district court's findings of fact were "clearly erroneous" within Rule 52(a), F.R. Civ. P.

5. Whether the permanent injunction, framed in the light of the Secretary's conduct since the entry of the preliminary injunction, was within the scope of the chancellor's discretion and consistent with established equitable principles.



INDEX

	Page
Questions presented	i
Jurisdictional statement	1
Counterstatement of the case	2
A. Secretary encourages campaign to eliminate General Counsel	4
B. New charges and Secretarial termination follow the General Counsel's refusal to resign	5
C. Secretary's further interferences with General Counsel's performance of his contract	6
(i) Rummaging through Navajo files and aspor- tation of Tribal and other documents ..	6
(ii) Ejection of General Counsel from Tribal Council meetings with apparent Secre- tarial approbation	7
(iii) Virtual destruction of Navajo Legal Depart- ment	8
(iv) Non-payment of General Counsel's retainer vouchers	8
D. The charges made against the General Counsel ..	9
(i) Raise in compensation effected by Amend- ment No. 9	10
(ii) Use of general counsel attorneys on claims cases	11
(iii) Classification of <i>Healing v. Jones</i> as a claims case effected by Amendment No. 11	12
(iv) Post-suspension charges against the General Counsel	15
E. Scope of the permanent injunction	16

	Page
Summary of Argument	17
Argument	21
I. Since the Secretary lacked power to cancel the General Counsel's contract with the Navajo Tribe, he was properly enjoined from doing so, and that injunction did not and could not involve any interference with the Tribe's internal affairs inasmuch as the Tribe was not a necessary party to the action	22
A. Further research into the statutes and the administrative practice confirms the correctness of this Court's earlier holding that the Secretary has no power to cancel administratively any Indian contracts already approved	22
B. The Secretary was properly enjoined because, in excess of any powers conferred upon him by law, he was tortiously interfering with a contractual relationship	29
C. Inasmuch as the final decree simply protects the contract between the General Counsel and the Navajo Tribe of Indians by enjoining third party interference with its performance, the district court's action is not properly subject to the Secretary's extravagant criticisms that the injunction gives the Tribal Council a free hand and makes it superior to the Secretary, or that the injunction involves a denial of Federal supervision, or that the injunction unreasonably seeks to control the Secretary's discretionary authority, or that it seeks to coerce the personal services of an attorney	30

	Page
D. Similarly, since the Navajo Tribe, the other party to the contract, was not a necessary party in the present proceeding, the injunction involved no intrusion into that Tribe's internal affairs	34
II. To the extent that the facts and issues in dispute between the parties become material in the light of the Secretary's lack of power to cancel, they demonstrate not only that there were no grounds for termination but also that the termination action was not taken in good faith	35
A. Since a public officer cannot enlarge his powers by defaming his opponents, the Secretary's charges did not bar the General Counsel from judicial relief <i>in limine</i>	35
B. The charges made by the Secretary against the General Counsel were groundless in both law and fact	37
1. Increase in compensation effected by Amendment No. 9	37
2. Use of general counsel attorneys on claims cases	40
3. Classification of <i>Healing v. Jones</i> as a claims case effected by Amendment No. 11	42
C. Contrariwise, the Secretary's purported termination of the contract was action taken in demonstrable bad faith	45
III. The district court's findings of fact, far from being "clearly erroneous," are in every respect fully sustained by the evidence	47

	Page
IV. The conduct of the Secretary and of his subordinates during the pendency of the preliminary injunction amply warranted and indeed required the broader and more detailed restraints included in the permanent injunction	67
A. It is well settled that a defendant's misconduct justifies more particularized injunctive relief against him	67
B. The permanent injunction is designed to meet every means by which the Secretary was shown, even after the entry of the preliminary injunction, to have carried out his predetermined purpose to get rid of the General Counsel, and it accomplishes that result without in any respect exceeding the scope of hitherto approved injunctions against public officers	68
1. Enjoining termination of the contract	68
2. Enjoining improper interference with performance of contract	68
3. Enjoining improper interference with ordinary course of payment of vouchers	71
4. Injunction complies with hitherto formulated limitations	73
Conclusion	74
Appendix—Statutes, &c., involved	75

AUTHORITIES

Page

[Note: Authorities primarily relied upon are preceded by an asterisk.]

CASES:

<i>Adams v. United States ex rel. McCann</i> , 317 U.S. 269	24
<i>Ambassador, Inc. v. United States</i> , 325 U.S. 317	67
* <i>Arkansas v. Texas</i> , 346 U.S. 368	18, 29, 34
<i>Begay v. State</i> , 63 N.M. 409, 320 P. 2d 1017, certiorari denied <i>sub nom. New Mexico v. Begay</i> , 357 U.S. 918	57
<i>Beneficial Finance Co. v. Wirtz</i> , 346 F. 2d 340	67
<i>Bland v. Connally</i> , 110 U.S. App. D.C. 375, 293 F. 2d 852	29
<i>Brown v. Allen</i> , 344 U.S. 443	34
* <i>Coler v. Corn Exchange Bank</i> , 250 N.Y. 136, 164 N.E. 882	28
* <i>Commissioner v. Duberstein</i> , 363 U.S. 278	54, 60
<i>Elm Corporation v. E. M. Rosenthal Jewelry Co.</i> , 82 U.S. App. D.C. 196, 161 F. 2d 902	67
<i>Fleming v. Knudson & Mercer Lumber Co.</i> , 159 F. 2d 212	67
<i>Gideon v. Wainwright</i> , 372 U.S. 335	24
<i>Great Lakes Dredge & Dock Co. v. Huffman</i> , 319 U.S. 293	36
<i>Harmon v. Brucker</i> , 355 U.S. 579	29
* <i>Healing v. Jones</i> , 174 F. Supp. 211	14, 42, 43, 44
<i>Healing v. Jones</i> , 210 F. Supp. 125, affirmed, 373 U.S. 758	12, 13, 14, 41, 42, 44, 52, 54, 55, 58
<i>Johnson v. Zerbst</i> , 304 U.S. 458	24
* <i>Labor Board v. Express Pub. Co.</i> , 312 U.S. 426	67
<i>Littell v. Nakai</i> , 344 F. 2d 486, certiorari denied, 382 U.S. 986	7, 34
* <i>Local 167 v. United States</i> , 291 U.S. 293	67, 73
* <i>Lumley v. Gye</i> , 2 E. & B. 216	32, 34, 37
<i>Martin v. Texas</i> , 382 U.S. 928	34
<i>May Department Stores v. Labor Board</i> , 326 U.S. 376	67
<i>McComb v. LaCasa del Transporte</i> , 167 F. 2d 209	67
* <i>Miguel v. McCarl</i> , 291 U.S. 442	20, 73

	Page
<i>Narajo Tribe v. Labor Board</i> , 109 U.S. App. D.C. 378, 288 F. 2d 162, certiorari denied, 366 U.S. 928	57
<i>Payne v. Central Pac. R. Co.</i> , 255 U.S. 228	73
<i>Payne v. New Mexico</i> , 255 U.S. 367	73
* <i>Peters v. Hobby</i> , 349 U.S. 331	18, 36
* <i>Philadelphia Co. v. Stimson</i> , 223 U.S. 605	29
<i>Santa Fe R. Co. v. Fall</i> , 259 U.S. 197	7
* <i>Service v. Dulles</i> , 354 U.S. 363	36
<i>Socash v. Addison Crane Co.</i> , 120 U.S. App. D.C. 308, 346 F. 2d 420	54
<i>Tilbrook v. Forrestal</i> , 65 F. Supp. 1	67
* <i>Udall v. Littell</i> , 119 U.S. App. D.C. 197, 338 F. 2d 537	2, 6
<i>United States v. National Association of Real Estate Boards</i> , 339 U.S. 485	54
* <i>Vitarelli v. Seaton</i> , 359 U.S. 535	36
<i>Walling v. Panther Creek Mines</i> , 148 F. 2d 604	67
<i>Warner & Co. v. Lilly & Co.</i> , 265 U.S. 526	67
<i>Warren Trading Post v. Tax Comm'n</i> , 380 U.S. 685	30
* <i>West v. Standard Oil Co.</i> , 278 U.S. 200	27
<i>Wilbur v. United States</i> , 280 U.S. 306	73
<i>Williams v. Lee</i> , 358 U.S. 217	57
<i>Worcester v. Georgia</i> , 6 Pet. 515	30

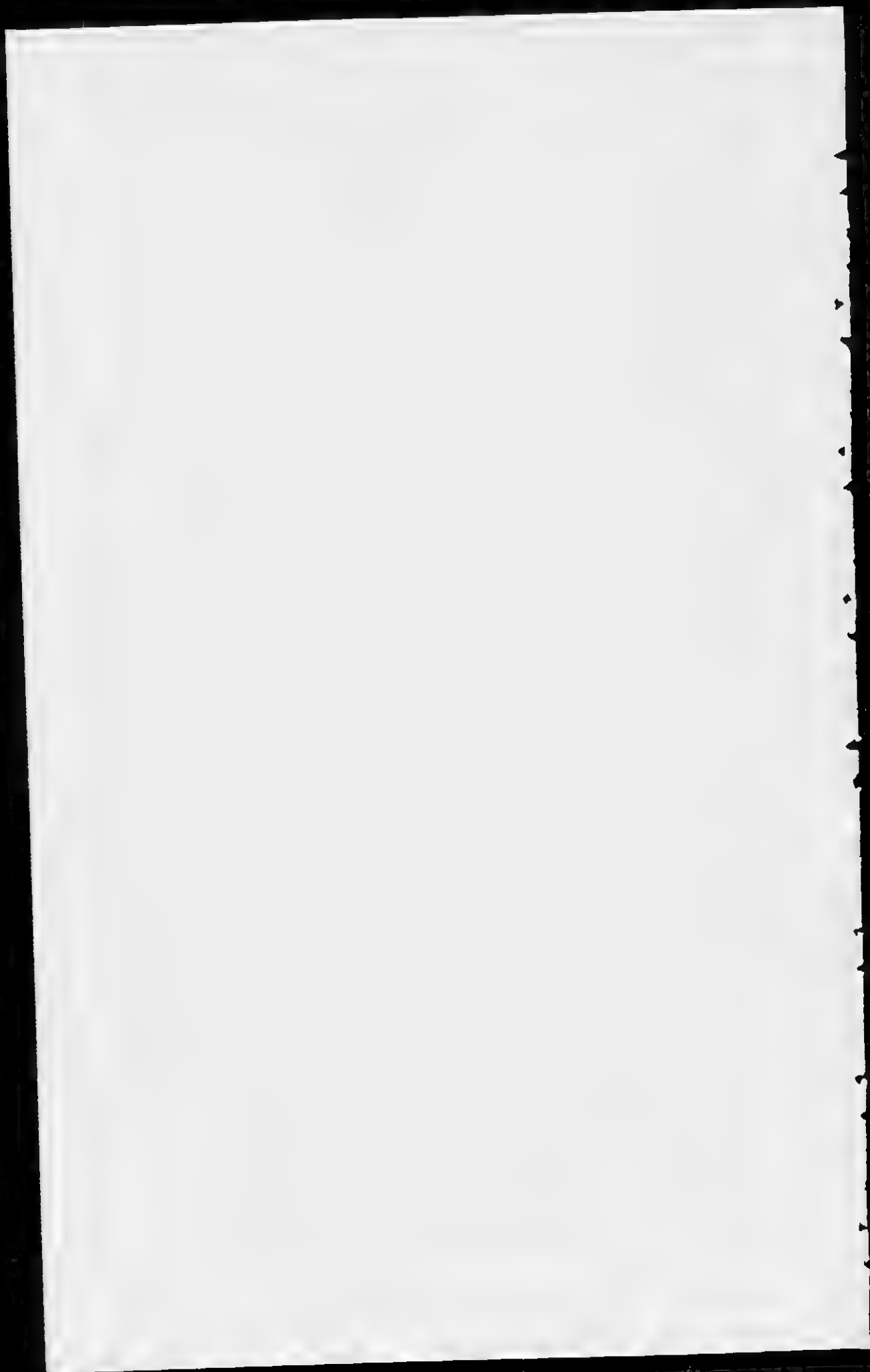
STATUTES:

Act of March 3, 1871, c. 120, 16 Stat. 544	23
Act of May 21, 1872, c. 177, 17 Stat. 136	17, 18, 25
*Act of April 27, 1874, c. 135, 18 Stat. 35	18, 25, 26
Act of June 26, 1936, c. 851, 49 Stat. 1984	26
Act of June 17, 1957, 71 Stat. 157, § 2201(1)	22
*Interior Department Appropriation Act, 1965, P.L. 88-356, 78 Stat. 273	63
*Interior Department Appropriation Act, 1966, P.L. 89-52, 79 Stat. 174	63
R. S. § 441	17, 22, 23, 26
R. S. § 463	17, 22, 23, 26
R. S. § 2103	2, 10, 17, 23, 24, 26, 75
R. S. § 2104	17, 23, 24, 73, 75

Index Continued

vii

	Page
R. S. § 2106	23
5 U.S.C. § 485	22
25 U.S.C. § 2	22
25 U.S.C. § 81	2, 23, 24, 75
25 U.S.C. § 81a	26
25 U.S.C. § 82	23, 24, 73, 75
25 U.S.C. § 84	23
NAVAJO TRIBAL CODE PROVISIONS:	
*2 N.T.C. § 101	4, 30, 75, JA 159
2 N.T.C. § 281	4, 33, 75, JA 159
2 N.T.C. § 284	4, 33, 75, JA 2029
*2 N.T.C. § 1173(c)	4, 30, 32, 33, 75, JA 163
MISCELLANEOUS:	
Cohen, <i>Handbook of Federal Indian Law</i> (1941) 77 ..	24
same, p. 281	26
*F.R. Civ. P., Rule 52(a)	47, 75
79 Harv. L. Rev. 851	34
*Indian Affairs Manual, § 606.11C(4)(a)	75, JA 2543
Sen. Rep. No. 8, 83d Cong., 1st sess.	26, 27
5 & 6 USCA, 1950 Cum. Supp., p. 270	22
U.S. Dept. Int., <i>Federal Indian Law</i> (1958) 114	24
same, pp. 485-486	26
3 Wigmore, <i>Evidence</i> (3d ed. 1940) §§ 1008-1015	48



IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,725

STEWART L. UDALL, Secretary of the Interior, *Appellant*,

v.

NORMAN M. LITTELL, *Appellee*.

**Appeal From the United States District Court
for the District of Columbia**

BRIEF FOR APPELLEE

JURISDICTIONAL STATEMENT

Following a trial that extended over a period of two weeks (JA 1073-1888), the district court on May 26, 1965, filed an opinion (JA 2610-2642b; 242 F. Supp. 635), made findings of fact (J.A. 2643-2675) and conclusions of law (JA 2675-2679), and entered a comprehensive permanent

injunction (JA 2683-2687). The notice of appeal (JA 2680) was filed on July 23, 1965. This Court's jurisdiction rests on 28 U.S.C. §1291.¹

COUNTERSTATEMENT OF THE CASE

This case is here for the second time. In *Udall v. Littell*, 119 U.S. App. D.C. 197, 338 F. 2d 537, JA 351-362, this Court affirmed a preliminary injunction that enjoined the appellant Secretary of the Interior from terminating, etc., appellee's contract as General Counsel and Claims Attorney of the Navajo Tribe of Indians, which contract had theretofore been approved by the Secretary pursuant to R.S. §2103 (25 U.S.C. §81).²

When the case was thereafter tried, the appellee (hereinafter more usually "General Counsel") introduced the former record plus a few additional exhibits, primarily documents referred to but not included therein, and rested (JA 1099-1108), urging that the only issue concerned the Secretary's power (JA 1077-1080, 1092-1098, 1111-1116).

At the Secretary's insistence, however, the district court ruled that every issue raised by the pleadings be tried (JA 1116). The result was, not that "the facts are far different from those appearing by affidavits on the previous appeal" (Sec. Br. 20)—that statement is simply not so;

¹ "JA" refers to the Joint Appendix, which is paged consecutively. The first 345 pages of the Joint Appendix on the earlier appeal, No. 18338, constituted Pl. Ex. A at the trial (JA 1099-1100). Pages 1 through 325 of the present Joint Appendix reproduce the earlier Joint Appendix page for page and line for line.

We are advised that some exhibits inadvertently omitted from the present Joint Appendix will be made available in a supplemental volume (herein simply "Supp. JA").

² In order to avoid a multiplicity of cross-references, we cite statutes without more. Our Appendix, *infra*, page 75, gives either the text or the location of every statute, rule of court, and tribal code provision whose precise terms are involved here.

actually, only minor and wholly immaterial discrepancies were shown by the Secretary during the course of a long trial.³

Rather, the General Counsel was able to demonstrate, primarily through cross-examination of the Secretary and of his witnesses, the details of the "brutal and shabby" treatment to which the General Counsel had been subjected by the Secretary and by his subordinates (JA 2627), details that appear both in the district court's opinion and in the findings of fact—but not in the Secretary's brief.

The counterstatement below is required, for that reason, and because the Secretary in a number of material respects demonstrably mistates the record.⁴

³ (1) The General Counsel alleged that "secret meetings" had been held (JA 15, 257); the Secretary's proof established that meetings has indeed been held, which were not secret (JA 1221, 1285-1286, 1293), but at which no minutes were kept (Fdg. 28, JA 2650).

(2) The General Counsel asserted that Barry DeRose had been the Secretary's campaign manager at an Arizona convention (JA 1972). This was shown to be untrue, because there are no conventions in Arizona (JA 1629), and that DeRose, as County Chairman, had simply supported and campaigned for Mr. Udall, although earlier DeRose had supported a rival (JA 1296, 1628-1630). But, whether or not DeRose was the Secretary's campaign manager, he is shown on this record to have been the manager for Nakai *et als.* in their campaign against the General Counsel (Fdgs. 16, 21, 22A, 23, 24, 26, 28, 29; JA 2647-2650).

⁴ We should add that, by and large, we restrict our citations to the findings of fact made by the district court. This course is dictated, not only by considerations of brevity, but, preeminently, by the circumstance that our review of the findings objected to by the Secretary (Point III, *infra*, pp. 47-66) has demonstrated that every one of them is amply supported by the record.

**A. Secretary encourages campaign to eliminate
General Counsel**

Early in 1963, one, Raymond Nakai, was elected Chairman of the Navajo Tribal Council, on a campaign to get rid of the General Counsel, and, before he was even inaugurated, went to Washington seeking the Secretary's assistance to that end; the Secretary suggested that someone in the area of the reservation be obtained as tribal attorney (Fdgs. 10-12, JA 2644-2646).

Thereafter Nakai contacted, among others, "attorneys with an obvious self-interest to pursue in securing lucrative positions with the Tribe" (JA 2611), and again went to Washington to see the Secretary (Fdgs. 13-24, JA 2646-2649). One, Barry DeRose, an Arizona attorney and "an old friend" of the Secretary (JA 1008) arranged the appointment (Fdgs. 22A-24, JA 2649).

On learning from Nakai that he would have no chance against the General Counsel before the Navajo Tribal Council, which was and is the governing body of the Navajo Tribe (Fdg. 6, JA 2644; 2 N.T.C. §101), the Secretary suggested that Nakai obtain a resolution from the Advisory Committee, a group appointed by Nakai, that the Secretary recognized to be a "stacked body" (Fdgs. 9, 24, JA 2644, 2649).

It is appropriate to note here that the Secretary (Sec. Br. 3) improperly enlarges the role of the Chairman and unwarrantably minimizes that of the Tribal Council. See Fdgs. 6, 8 (JA 2644), which are based on 2 N.T.C. §§101, 281, 284, 1173(c). Specifically, the Tribal Council is more than a "legislature" (Sec. Br. 3), it is the governing body of the Tribe (2 N.T.C. §101).

DeRose, who was shown to have been wholly without information concerning the most essential aspects of the subject-matter (Fdg. 68A, JA 2662), assisted in preparing the Advisory Committee's resolution of complaint, which

was adopted at a meeting at which no minutes were taken, and which was never formally brought to the General Counsel's attention by its framers or proposers (Fdgs. 28-29, JA 2650).

That resolution was turned over to an Interior Department lawyer with no prior experience in law practice or Indian law, resulting in the Solicitor's October Memorandum, which concluded that the Secretary was warranted in recommending termination of the General Counsel's contract to the Navajo Tribal Council, the only body empowered to do so (Fdgs. 32-33, JA 2651-2652; Op., JA 2618).

B. New charges and Secretarial termination follow the General Counsel's refusal to resign

The Secretary sent for the General Counsel, showed him the October Memorandum, and urged a "constructive solution," viz., the General Counsel's resignation. When it was pointed out that this would involve irreparable damage to pending Navajo claims cases, "the defendant Secretary said that he never intended that the plaintiff should resign as the Tribe's Claims Attorney but only as General Counsel" (Fdg. 35, JA 2652).⁵

Accordingly, since the General Counsel refused to resign and since the majority of the Tribal Council wished to retain him, the Secretary directed his Solicitor to prepare new "November Memoranda," which added to and aggravated the charges made in October and which concluded that the Secretary could remove the General Counsel administratively (Fdgs. 36, 38, JA 2652-2653). The district court determined that "the change in attitude by [Solicitor] Barry and the Secretary was not motivated by a recognition

⁵ "At the time of this conversation, plaintiff as Claims Attorney had in 16 years as such never received a penny of compensation for his labors in that capacity" (Fdg. 35, JA 2652).

of any existing legal power to cancel the contract, but their creation of an assumed power not authorized by law but only motivated by their desire to 'get rid of Littell'" (JA 2618). The Secretary himself testified that ever since October 11, the date of his conference with the General Counsel, "it has been our policy to get him out" (Fdgs. 45-46, JA 2655).

The differences between the October and November Memoranda are summarized below under subheading "D", *infra*, pp. 9-15.

On the basis of the November Memoranda, the Secretary purported to suspend and then to terminate the General Counsel's contract (Fdg. 39, JA 2653-2654). The district court found (Fdg. 48, JA 2656) that "Plaintiff could not in point of actual fact have obtained relief from his suspension within the Department of the Interior after November 1, 1963." The General Counsel accordingly brought suit, and obtained the preliminary injunction that this Court has since affirmed (Fdgs. 40-41, JA 2654; *Udall v. Littell*, 119 U.S. App. D.C. 197, 338 F. 2d 537, JA 351-362).

C. Secretary's further interferences with General Counsel's performance of his contract

(i) Rummaging through Navajo files and asportation of Tribal and other documents

Following his purported suspension of the General Counsel, the Secretary dispatched one, Stanley Zimmerman, the inexperienced lawyer who had worked on the October Memorandum, to the Navajo Tribe's headquarters in Arizona to obtain additional evidence to support the conclusions on which the Secretary's action was based (Fdg. 82, JA 2666). Zimmerman rummaged through the files at will, taking and carrying away papers that extended to personal possessions of Tribal employees as well as to documents relating to the Tribe's claims in land matters that

were pending before the Secretary; some of the latter were received in evidence (Fdgs. 83-84, JA 2666).⁶

(ii) Ejection of General Counsel from Tribal Council meetings with apparent Secretarial approbation

Nakai undertook to justify the General Counsel's elimination at the meeting of the Navajo Tribal Council scheduled for December 9, 1963, and circulated a "White Paper," prepared with the assistance of some of the Secretary's subordinates; by the time of the meeting, however, Nakai had changed his mind and instead sought with the help of Zimmerman and others to keep the matter of the General Counsel's contract off the agenda (Fdgs. 85-87, JA 2666-2667).

The meeting, when held, was attended by an unusually large number of the Secretary's subordinates; while it was in progress, Nakai caused the General Counsel to be removed from the meeting, with the apparent approval of the Secretary's subordinates, but in violation of the General Counsel's contract; later, at a meeting in February 1964, Nakai effected a similar ejection (Fdgs. 88-95, 100, JA 2667-2670; Conc. 18, JA 2678).

The General Counsel sought by suit against Nakai to enjoin further evictions; this action failed on jurisdictional grounds (Fdgs. 96-98, JA 2669; *Littell v. Nakai*, 344 F. 2d 486 (C.A. 9), certiorari denied, 382 U.S. 986). The General Counsel also moved to cite the Secretary, Solicitor Barry, and Zimmerman for contempt arising out of their complicity in the eviction, but failed, since it was not then shown that

⁶ Under *Santa Fe R. Co. v. Fall*, 259 U.S. 197, 199, the Secretary must act on the facts then before him, so that subsequently obtained evidence is inadmissible to support administrative action already taken. Accordingly, the General Counsel objected on that ground to Def. Ex. 4-8 and 9-13 (JA 1204-1208, 1216, 1228-1229), and later moved to strike them for the same reason (JA 1881-1882). But since no findings rest on those exhibits, cf. Fdg. 62A (JA 2659-2660), the issue does not arise further on appeal.

it was the Secretary's policy to get the General Counsel out (Fdgs. 99-101A, JA 2669-2670; Op., JA 2629-2642b).⁷ Following the plenary trial, however, the district court "noted that if all of the evidence that was introduced by both parties in the present action had been available for the Court's consideration at the contempt proceeding, the conclusion reached by the Court in that case undoubtedly would have been different" (JA 2614).

(iii) Virtual destruction of Navajo Legal Department

At the Navajo Tribal Council meeting in May 1963, salary increases for five of the General Counsel's assistants were voted in Amendment No. 13 to his contract;⁸ up to the time of trial, however, nearly two years later, that Amendment had been neither approved nor disapproved by the Secretary, with the result that each of the five attorneys concerned has resigned, and with the further consequence that "the Legal Department of the Navajo Tribe of Indians has been virtually destroyed" (Fdgs. 101-106, JA 2670-2671). The district court found as a fact (Fdgs. 107, JA 2671) that "The Secretary has contributed to the almost total destruction of the Navajo Tribe's Legal Department and the isolation and circumvention of the plaintiff as its general counsel as a result of the defendant Secretary's announced 'policy to get him out.'"

(iv) Non-payment of General Counsel's retainer vouchers

Prior to the General Counsel's suspension, his monthly retainer vouchers had been paid on an average of 17 days following submission (Fdgs. 107A-108, JA 2672). The

⁷ The Secretary (Sec. Br. 9) fails to note that Solicitor Barry became a respondent in the contempt proceeding (Fdgs. 99, 100; JA 2669-2670).

⁸ The Secretary twice errs in referring to 11 approved amendments (Sec. Br. 6, 47); all the documents relating to Amendment 12 were received in evidence without objection (Pl. Ex. M-P, JA 2135-2147), and Fdgs. 3 and 103 (JA 2643, 2671) plainly refer to 12 amendments.

vouchers held up pursuant to his purported suspension by the Secretary, which were released in consequence of the operation of the injunction, were paid after an elapsed time of 161 and 100 days (Fdg. 109, JA 2672-2673). Thereafter Nakai and the Secretary and their respective subordinates engaged in a series of maneuvers, including a motion to "clarify" the injunction, which held up payment of nine other retainer vouchers for periods ranging from 324 to 105 days, although none of these vouchers was ever returned for corrections or additional data (Fdgs. 110-112, JA 2673). After it was shown in court that under Bureau of Indian Affairs regulations "Payments of attorneys' fees or compensation do not require tribal approval," additional vouchers were paid in periods ranging from 107 days to only 1 day (Fdgs. 113-114, JA 2673-2674).

The district court found (Fdgs. 115-116, JA 2674) that "Letters and memoranda emanating from members of the Department of the Interior reflect a persistent purpose to obstruct, at least to the extent that the terms of the preliminary injunction permitted, the payment of the plaintiff's retainer and expense vouchers," and that, "unless the defendant Secretary and his subordinates are appropriately restrained and enjoined by injunction, they will probably continue to interpose obstacles and delays, either directly or indirectly, to the prompt payment of plaintiff's expense and retainer vouchers."

D. The charges made against the General Counsel

As has been shown, Solicitor Barry, who in October 1963 advised the Secretary that he should recommend termination of the General Counsel's contract to the Navajo Tribal Council (Fdg. 33, JA 2651-2652), in November 1963 advised the Secretary to terminate the contract on his own (Fdg. 38, JA 2652-2653); no new authorities were adduced to support the change of position, and the record clearly shows that the November Memoranda were prepared at the Secretary's direction when the General Counsel refused to resign and it became apparent that a majority of the Tribal

Council were favorable to him (Fdg. 36, JA 2652; Op., JA 2616). The record further shows that the purported termination of the General Counsel's approved contract by the Secretary represented the first instance in the more than 90 years that R.S. §2103 and its predecessors have been in effect that any Secretary had ever undertaken to cancel administratively any approved Indian contract (Fdg. 43, JA 2655).

It remains to consider the several charges levelled at the General Counsel in the Solicitor's three memoranda and later by witnesses at the trial.

(i) **Raise in compensation effected by Amendment No. 9**

Article 4(a) of the basic contract as negotiated provided for increases in the attorneys' compensation by provisions in the Tribal budget, effective upon the approval of the budget by the Tribal Council (JA 40). This provision was approved in the Interior Department subject to two conditions, first that such increases must also be approved by the Commissioner, second that neither the compensation of the General Counsel nor that of Mr. Alexander should be increased for five years (JA 49, ¶¶3, 4).⁹

⁹ The full text (JA 40), with conditions imposed by the Commissioner at the time of approving the contract (¶¶3 and 4, JA 49) shown in italics, read as follows:

"From and after the approval of this agreement by the Commissioner of Indian Affairs, the compensation of the attorneys for General Counsel services may be increased by providing in the Tribal Budget for any such increase, *Provided However, that any such increase in compensation shall not take effect until such time as the Tribal Budget has been approved by the Tribal Council and the Commissioner of Indian Affairs; Provided Further that there shall be no change in the compensation of Mr. Littell and Mr. Alexander during the first five years of this contract.*"

The Secretary, by setting forth only the last clause of the condition imposed (Sec. Br. 50), quotes partially and hence quite out of context.

Four years later, while the General Counsel was abroad, the Tribal Council voted to increase his compensation, not by budget item, but by formal amendment of the basic contract, in respect of which normal amendment procedures were followed. That amendment, No. 9, was approved by the Secretary personally, after his subordinates had considered at least two supporting memoranda, with a statement that "I find it to be in the best interest of the Indians" (Fdgs. 49-52, JA 2656-2657).

This increase was not mentioned in the Solicitor's October Memorandum, nor was it referred to by the Secretary when he conferred with the General Counsel on October 11; it first appeared as an accusation in one of the November Memoranda (Fdgs. 53-54, JA 2657). When the Secretary testified, he characterized his earlier approval as merely routine and perfunctory (Fdg. 52, JA 2657).

The district court found as a fact that there was nothing before the Department of the Interior in November 1963 regarding Amendment No. 9 that had not been before it when that amendment was approved by the Secretary (Fdg. 55, JA 2657), and held as a matter of law, first, that the parties were free to waive the five year limitation provided such waiver was approved by the Secretary (Cone. 9, JA 2676), and, further, that even if the Secretary had legal power to terminate the contract, the charge made in connection with Amendment No. 9 would not have constituted good cause for such a step (Cone. 10, JA 2676).

The record shows that the five year limitation was twice waived by formal amendments in respect of Mr. Alexander, once after two years, the second time after three; Amendments 5 and 6 (JA 68-79).

(ii) Use of general counsel attorneys on claims cases

The General Counsel's basic contract recognized a distinction between general counsel services, compensated by retainer, and claims services, compensated only by a per-

centage of recovery; many of the General Counsel's subordinates were not permitted to be employed on claims cases, but these restrictions were later removed in respect of two assistants (Fdgs. 56-57, JA 2658).

Many cases had both claims and general counsel aspects (Fdg. 58, JA 2658-2659), and on occasion general counsel lawyers were used in claims litigation (Fdg. 59, JA 2659). In October, Solicitor Barry suggested that claims fees due under the contract would be subject to set-off accordingly, but in November he shifted to relying on claims use of general counsel attorneys as a ground for termination (Fdg. 60, JA 2659), even though the November Memoranda did not point out the inconsistency between this assertion insofar as it involved general counsel attorneys' participation in *Healing v. Jones* and the further charge that *Healing v. Jones* had been improperly classified as a claims case (Fdg. 62, JA 2659).

No findings were made by the district court concerning the extent of the use of general counsel attorneys on claims cases, since no bill for services in claims cases has ever been submitted (Fdg. 62A, JA 2659-2660), because such use in furtherance of the Tribe's interests would in no circumstances justify termination of the contract for cause (Conc. 11, JA 2677), and because a set-off if one is due would adequately protect the Tribe (Conc. 12, JA 2677).

(iii) Classification of *Healing v. Jones* as a claims case
effected by Amendment No. 11

At the request of the Undersecretary of the Interior, who sought a definition of what were and what were not claims cases within the General Counsel's contract, Chairman Jones of the Navajo Tribal Council listed *Healing v. Jones*, the Navajo-Hopi litigation, as a claims case (Fdg. 63, JA 2660). Solicitor Stevens disagreed, and the General Counsel in turn disagreed with Stevens; thereafter, when the General Counsel furnished copies of the Advisory Com-

mittee meeting of September 24, 1957, Stevens changed his opinion, and concurred in holding *Healing v. Jones* to be a claims case (Fdgs. 64-65, JA 2660-2661).

The Advisory Committee, at the cited meeting, negotiated the terms of the General Counsel's contract pursuant to authorization from the Tribal Council, and at that meeting the General Counsel fully and frankly disclosed why in his view the Navajo-Hopi dispute would become a claims case once Congress had authorized the litigation (Fdg. 66, JA 2661). Similar statements were repeatedly made thereafter by the General Counsel to the Navajo Tribal Council (Fdg. 68, JA 2662).

The assertion, twice made by the Secretary (Sec. Br. 6, 45), that the minutes of the Advisory Committee meeting of September 24, 1957 "were not discovered by representatives of the Department of the Interior until November 1963" is demonstrably untrue.

Finding 65 (JA 2661) shows that when Solicitor Stevens changed his mind on January 19, 1961, and agreed with the General Counsel that *Healing v. Jones* was a claims case, he relied on the Advisory Committee minutes. See Pl. Ex. I, K (JA 2060-2061, 2062-2134), incorporated by reference into the finding. Those minutes were not returned to the General Counsel until two months later (Pl. Ex. J, JA 2061).

Finding 66 (JA 2661) shows that full disclosure was made by the General Counsel, a finding that rests on the written minutes themselves (Pl. Ex. K, at JA 2087, 2090, 2092, 2094-2097). Moreover, Finding 73 (JA 2663) shows that those same minutes were before Solicitor Barry prior to November, as Barry himself admitted (JA 1733, 1761).

It is therefore a wholly unsupported misstatement for the Secretary to assert a lack of knowledge before November 1963 of the minutes of the September 24, 1957, meeting of the Advisory Committee.

Amendment No. 11, which made *Healing v. Jones* a claims case in terms, was approved by Solicitor Barry after obtaining additional data from the General Counsel, and was then approved by the Secretary (Fdg. 66A, JA 2661-2662).

Later, in both his October and November Memoranda, in which he held *Healing v. Jones* to have been improperly classified as a claims case, Barry did not cite *Healing v. Jones*, 174 F. Supp. 211 (D. Ariz.), where the United States had sought to dismiss the litigation for want of jurisdiction; did not mention his personal approval of Amendment No. 11; and while asserting that the Tribal Council minutes did not show any consideration being given to the status of the case, failed to disclose that such consideration was in fact given by the Advisory Committee which the Tribal Council had authorized to conduct the negotiations (Fdgs. 69-71, JA 2662-2663).

The district court found as a fact that nothing that was available to Barry in October and November 1963 was not equally available to him when he approved Amendment No. 11 (Fdg. 72, JA 2663), and further found that some at least of the minutes that reflected the General Counsel's views regarding *Healing v. Jones* were before Barry in October and November 1963 (Fdg. 73, JA 2663).

No fee has been formulated by the General Counsel in respect of *Healing v. Jones*, no fee has been negotiated, and no voucher has been submitted by him (Fdg. 74, JA 2663-2664); contrariwise, his adversary, counsel for the Hopis, has advised the Hopi Tribal Council that *Healing v. Jones* was a claims case (Fdg. 75, JA 2664).

The district court held that the status of that case was a matter of law under the original contract, that the General Counsel's part in negotiating Amendment No. 11 involved neither overreaching nor unethical conduct, that at the very weakest the status of *Healing v. Jones* was a debatable

question on which reasonable lawyers might differ, and that the General Counsel's insistence that it was a claims case, "particularly after he had persuaded Solicitor Stevens to adopt that view after first rejecting it, did not as a matter of law justify the assertions against the plaintiff, in the October and November Memoranda and at the trial, that in so classifying that case he had been guilty of improper conduct" (Cone. 13-15, JA 2677). Accordingly, the district court concluded that the General Counsel's activities under the present heading did not constitute good cause for the termination of his contract (Cone. 16, JA 2678).

(iv) Post-suspension charges against the General Counsel

Some of the Secretary's witnesses charged that the General Counsel "was always fighting everyone"; in fact, he was litigating on behalf of the Navajo Tribe in furtherance of that Tribe's interests (Fdg. 76, JA 2664).

The assertion made by the Secretary at the trial, that the General Counsel was "adroit" in getting matters through the Department of the Interior, and that he "sneaked papers through the Department," were found by the district court on a careful review of the relevant evidence to be "groundless in point of fact" (Fdg. 77-78, JA 2664-2665).

The district court found that the entire record—which fills no less than 2687 printed pages—failed to contain a single complaint over more than 17 years of any lack of professional competence on the General Counsel's part (Fdg. 79, JA 2665); that during this period "he has at all times represented his client competently, faithfully, loyally and honestly" (Fdg. 80, JA 2665); and that the conclusions reached at the close of the contempt hearing that the General Counsel "is 'a man of outstanding integrity and character,' and that he is 'an outstanding lawyer,' have not been altered by any of the testimony adduced against him at the trial, but have on the contrary been in every respect confirmed" (Fdg. 81, JA 2665-2666).

The district court noted (JA 2622) the inconsistency between the Secretary's denunciations of the General Counsel at the trial and his willingness at their October 11 conference to permit him to continue as Claims Attorney, remarking that "A consideration of all the evidence makes it difficult for this Court to conclude that the Secretary really believes Littell to be as reprehensible as he would have the Court believe."

Accordingly, commenting that the General Counsel "was entitled to better treatment and consideration by those in a position of authority than he received," the district court said it "can only characterize that treatment, under the facts and circumstances of this case, as brutal and shabby" (JA 2627). The legal conclusion reached, therefore, was that "Even if the defendant Secretary's allegation that the plaintiff has unclean hands were well pleaded, it fails here, because the evidence here fails utterly to prove the allegation made" (Cone. 17, JA 2678).

E. Scope of the permanent injunction

The permanent injunction (JA 2683-2687) reflects the restraints of the earlier preliminary injunction heretofore affirmed by this Court (JA 345-350); there are a number of particularized additions.

One addition spells out and prohibits a particular phase of the Secretary's interference with the performance of the contract that the contempt hearing showed to have occurred. It was there ruled (JA 2634, 2396-2397) that the General Counsel had a right under his contract to report to the Tribal Council; this right is now safeguarded in two paragraphs of the permanent injunction (§§1(3), II(5), JA 2684-2686).

Another addition similarly spells out the former restraint against interference with the performance of the contract (§2, JA 349) by providing affirmatively that the Secretary

must recognize and deal with the General Counsel as such (¶¶III(1), III(2), JA 2686-2687).

Next, while the permanent injunction continues the restraint against interference with the ordinary course of payment of retainer vouchers (Prel. Inj. ¶3, JA 349; Perm. Inj. ¶II(3), JA 2685), it adds a similar restraint as to expense vouchers (¶II(4), JA 2685).

Finally, in the face of the findings regarding the "persistent purpose to obstruct" the payment of the General Counsel's vouchers (Fdgs. 115-116, JA 2674), the district court concluded that the General Counsel should no longer be required to follow "the payroll practices of The Navajo Tribe" (Cone. 21, JA 2678), but instead held that, if the Navajo officials do not act on his vouchers within 30 days, then the Secretary should process those vouchers under existing laws and regulations (Cone. 22, JA 2678-2679); and ¶III(3) of the permanent injunction (JA 2686-2687) so provides. As the district court said in its opinion (JA 2620), "Such arbitrary abuse of administrative power, as has been exhibited here in the handling of vouchers, must be prevented."

It may be noted that the permanent injunction, like the earlier one, nowhere contains any direction for the payment of money.

SUMMARY OF ARGUMENT

I. A. The heart of this case, whether the Secretary has power to cancel administratively an Indian contract once approved under the statute, has already been decided against him by this Court. Reexamination of the question, which the Secretary now reargues, confirms the correctness of the earlier rulings.

Proof of the inadequacy of the generalized provisions of R.S. §§441 and 463, which constitute the Secretary's basic reliance here, is found in the Act of May 21, 1872, now R.S. §§2103-2104, on which his powers over Indian contracts

rest. The 1872 legislation would have been unnecessary if the Secretary had had such powers originally. And, while the 1872 Act renders Indian contracts void without Secretarial approval, additional authority, conferred by the Act of April 27, 1874, was required to enable him to review earlier contracts already valid. It is the 1874 Act, plus the circumstance that this case represents the first instance in more than 90 years that administrative cancellation of an Indian contract has ever been attempted, which underscore the correctness of this Court's prior holding. Indeed, the Solicitor's original memorandum in this very case is in accord therewith.

B. The Secretary was properly enjoined, because, in excess of any powers conferred upon him by law, he was tortiously interfering with a contractual relationship.

C. Consequently the Secretary's present strictures are unfounded. The decree protects a contract against unlawful official action: it therefore does not involve any usurpation of the Secretary's powers, nor does it render the Tribal Council superior to the Secretary, nor does it seek to control the Secretary's discretionary powers. He had none in respect of terminating this contract. Similarly, the decree neither coerces personal services nor interferes with a client's right to discharge his attorney. Here the client is the Tribe, and the Tribe wants this lawyer. In short, restraining a tortfeasor from interfering with an attorney-client relationship does not involve improperly enforcing the performance of the attorney-client contract.

D. Similarly, since the Navajo Tribe, the other party to the contract, was not a necessary party in the present proceeding (*Arkansas v. Texas*, 346 U.S. 368), the decree involves no intrusion into that Tribe's internal affairs. The Secretary's arguments to the contrary are therefore without logical support.

II. A. A public officer cannot enlarge his powers by defaming his opponents, as *Peters v. Hobby*, 349 U.S. 331, and

similar employee removal cases demonstrate. Consequently the fact that the Secretary here had made "charges of a serious nature" against the General-Counsel, and that was the extent of the defense pleaded, did not bar the latter from judicial relief *in limine*—as indeed this Court held on the earlier appeal.

B. The charges made by the Secretary against the General Counsel were groundless in law and fact; this is shown on detailed analysis of the allegations made and of the evidence adduced to disprove them. None of those allegations justified termination of the contract even by one with power to do so.

C. Contrariwise, the Secretary's purported termination of the contract was action taken in demonstrable bad faith. This is shown primarily by the circumstance that the Secretary was perfectly willing to let the General Counsel keep his contingent Claims Attorney work if only he would resign his assured General Counsel retainer. It was not until resignation was refused and it was found that a majority of the Tribal Council supported their lawyer that the Secretary undertook termination on his own—in reliance on a demonstrably deceitful set of memoranda. And the essential bad faith of the entire termination performance was compounded by the hypocrisy of the Secretary's insistence that the General Counsel seek relief within the Department of the Interior after the Secretary had already determined upon a "policy to get him out." In short, the unclean hands in this case are those of the Secretary and of his Solicitor.

III. The district court's findings of fact, far from being "clearly erroneous," are in every respect fully sustained by the evidence. Indeed, detailed examination of every finding attacked by the Secretary establishes that his objections are basically substantive: He does not like the findings even when they rest on his own testimony or on that of his witnesses.

IV. A. A defendant's misconduct justifies more particularized injunctive relief against him to prevent recurrence of his unlawful acts or evasions on his part of the prohibitions of the preliminary decree.

B. The present injunction is designed to meet every means by which the Secretary was shown, even after the entry of the preliminary injunction, to have carried out his predetermined purpose to get rid of the General Counsel.

The provisions enjoining the Secretary's improper interference with the General Counsel's performance of his contract were specifically shaped to reach the evasions and attempted evasions of the generalized prohibition against such interference in the preliminary injunction, acts that took place during its pendency.

The provisions enjoining improper interference with the General Counsel's vouchers were, similarly, drawn to prevent a recurrence of the transparent devices that delayed payment of said vouchers in the face of the generalized—and unappealed—provision of the preliminary injunction against stopping or preventing the ordinary course of payment to the General Counsel. Actually, the Secretary is shown on one occasion to have ordered payment of vouchers to the General Counsel without the slightest reliance on the particular kind of Tribal action that he now insists on as essential.

Nothing in the decree directs the payment of money. The Secretary is simply ordered to process the vouchers on their merits, precisely in the form that the Supreme Court has approved in similar cases. E.g., *Miguel v. McCarl*, 291 U.S. 442, 456.

ARGUMENT

The proposition that every afterthought carries within it the unmistakable indication of its own unsoundness is significantly demonstrated by the Secretary's changing positions in the present litigation.

When this case was here earlier, on appeal from the preliminary injunction, the single point raised by the Secretary in his brief was (Sec. Br. No. 18338, p. 13) that "The Secretary of the Interior has power, under appropriate circumstances, to withdraw his approval of a contract of an attorney with an Indian tribe."

Now, on appeal from the permanent injunction, the Secretary—while indeed rearguing *de novo* the foregoing proposition, which this Court had earlier rejected—commences with the contention (Sec. Br. 20-32) that "The judgment is erroneous because of misunderstanding of the relative positions of the Secretary of the Interior, the Navajo Tribe and the Federal Court." Otherwise stated, the Secretary's present argument is that he is free from judicial supervision in respect of any and all actions he takes regarding Indians.

Indeed, the Secretary here adopts, in print (Sec. Br. 25) and presumably after deliberation, the threat that his counsel made in the heat of argument below (JA 1851-1853), "to withdraw recognition of the Navajo Tribal government, that would leave Mr. Littell attorney for the Navajo Tribe but without a client."

Is this not tantamount to announcing that, if this Court affirms the permanent injunction, the Secretary will still effectuate his expressed purpose to get the General Counsel out (Edgs. 45-46, JA 2655), even, if necessary, by destruction of the Navajo Tribal government?

We propose to show, in step by step progression, that the decree now under review is fully warranted and indeed required by the law and by the facts, and that it should be affirmed in all respects.

I. SINCE THE SECRETARY LACKED POWER TO CANCEL THE GENERAL COUNSEL'S CONTRACT WITH THE NAVAJO TRIBE, HE WAS PROPERLY ENJOINED FROM DOING SO, AND THAT INJUNCTION DID NOT AND COULD NOT INVOLVE ANY INTERFERENCE WITH THE TRIBE'S INTERNAL AFFAIRS INASMUCH AS THE TRIBE WAS NOT A NECESSARY PARTY TO THE ACTION.

A. Further research into the statutes and the administrative practice confirms the correctness of this Court's earlier holding that the Secretary has no power to cancel administratively any Indian contracts already approved.

The heart of this case, the central issue on which it turns, is the question whether the Secretary has power to cancel by administrative action an Indian contract already approved under the statute. The Secretary himself recognizes the primacy of that issue, because he undertakes to reargue it *de novo* after this Court decided it overwhelmingly against him on the first appeal. But since the Secretary's reargument overlooks controlling legislative and administrative materials, authorities that confirm the Court's earlier ruling in all respects, we deem it appropriate to marshal them anew, and to draw particular attention to a statute, not now in force and hitherto not mentioned, which shows that Congress recognized the need for specific legislative authority before the Secretary could set aside valid Indian contracts.

First. In response to this Court's earlier adverse holding (JA 357, 359), the Secretary once more puts forward the generalized provisions of R.S. §§441 and 463 (5 U.S.C. § 485, 25 U.S.C. § 2) on which his powers over Indians rest.¹⁰

¹⁰ The Secretary's reference (Sec. Br. 21-22) to "the Act of June 17, 1957, 71 Stat. 157, successor to R.S. 441," is far-fetched indeed; it has absolutely nothing to do with Indians: §2201(1) of the 1957 legislation simply purported to change par. 3 of R.S. §441 as amended to read "Bounty-lands" in lieu of "Pensions and bounty-lands." But if the 1950 Cumulative Supplement to 5 & 6 U.S.C.A. p. 270, is correct, that amendment had already been effected earlier.

R.S. §463 dates from 1832, R.S. §441 from 1849 (when the Interior Department was first created). Plainly, if these provisions, either singly or in combination, had been deemed adequate to render void any contract made by an Indian tribe with an outsider in the absence of Secretarial approval, or to enable the Secretary to cancel an existing and valid contract between such parties, there would have been no need for Congress to legislate on the subject of Indian contracts in the 1870s. The fact that Congress did so legislate constitutes a virtually conclusive showing that the Secretary's powers in respect of Indian contracts cannot be rested simply on his generalized and unspecified powers over Indian affairs.

Second. What is now R.S. §2103 first appeared as an unspecific provision to the effect that contracts with Indians required Secretarial approval as a prerequisite to validity. Sec. 3 of the Indian Appropriation Act, F.Y. 1872, Act of March 3, 1871, c. 120, 16 Stat. 544, 570-571.

In the following year, Congress on May 21, 1872, passed "An Act regulating the Mode of making private Contracts with Indians," c. 177, 17 Stat. 136. Sections 1 and 2 provided that all such contracts must be in writing, and specified in detail what they must contain; these became R.S. § 2103—and R.S. § 2106 (25 U.S.C. § 84), limiting assignments of Indian contracts, a provision not relevant here—and, with an amendment adopted in 1958 that deleted the requirements for executing the contract before a judge of a court of record and for having such judge certify to certain elements of the contract, are now found in 25 U.S.C. § 81.

Section 3 of the Act of May 21, 1872, dealing with payments under approved Indian contracts, became R.S. §2104 and is now 25 U.S.C. § 82.

Third. These being the only statutes now on the books that could possibly affect the Secretary's powers in the premises, these being moreover statutes enacted long after

the provisions granting generalized powers of Indian supervision, it is plain that the Secretary must look to the four corners of R.S. §§2103-2104 (25 U.S.C. §§81-82) to justify the actions that he sought to take in respect of the General Counsel's contract, actions that, as this Court has held, were rightfully enjoined during the pendency of the present litigation.

But nothing in the cited provisions authorizes, or by any stretch of construction can be deemed to authorize, the Secretary either to suspend an attorney or to terminate an attorney's contract after approval of that contract.

We cannot forbear to remark that, unlike other citizens whose rights to counsel of their own choosing have been recognized as entitled to constitutional protection in the highest degree (*Adams v. United States ex rel. McCann*, 317 U.S. 269; *Johnson v. Zerbst*, 304 U.S. 458; cf. *Gideon v. Wainwright*, 372 U.S. 335), an Indian tribe can only retain as counsel one whose employment conforms to carefully prescribed statutory requirements, and who has been approved by the Secretary of the Interior for such employment.¹¹

¹¹ The Interior Department has itself twice pointed to this effect of §2103 (Cohen, *Handbook of Federal Indian Law* [1941] 77; U.S. Dept. Int., *Federal Indian Law* [1958] 114):

"The Appropriation Act of March 3, 1871, provided not only for the termination of treaty-making with Indian tribes, but also, (sec. 3), for the withdrawal from non-citizen Indians and from Indian tribes of power to make contracts involving the payment of money for services relative to Indian lands or claims against the United States, unless such contracts should be approved by the Commissioner of Indian Affairs and the Secretary of the Interior. Since many of the grievances of the Indians were grievances against these officers, the Indians were effectually deprived by this statute of one of the most basic rights known to the common law, the right to free choice of counsel for the redress of injuries. These prohibitions were amplified by the Act of May 21, 1872."

Fourth. But there is another statute, not yet discussed, which shows virtually as a matter of mathematical certainty the correctness of this Court's earlier conclusion respecting the Secretary's lack of power to terminate Indian contracts administratively.

As has been shown, no attorney contract entered into following the Act of May 21, 1872, was valid in the absence of Secretarial approval: the statute in terms declared all such agreements "null and void." Earlier attorney contracts, being unaffected by the statute, were necessarily valid. If then the Secretary's powers in the absence of the 1872 Act had been sufficient to affect existing valid contracts, as he has contended throughout this controversy, then in 1872 the Secretary would have had power without more to review valid pre-1872 contracts, and terminate those that did not measure up to his notions of what Indian welfare required.

But Congress was of opinion that further legislation was necessary to confer such additional power. On April 27, 1874, it passed "An act relative to private contracts or agreements made with Indians prior to May twenty-first, eighteen hundred and seventy-two," c. 135, 18 Stat. 35. In Section 1, Congress declared that no private Indian contracts or agreements prior to that date should be recognized unless they were in writing and approved by the Secretary. Section 5 made it the duty of the Secretary to investigate all such existing contracts. And Section 4 laid down the guidelines: No contract was valid unless the Secretary on full examination of all supporting documents should consider it just and reasonable and not tainted with fraud and not exorbitant in its demands; contrariwise, if the Secretary on such consideration should consider any pre-1872 contract fraudulent or exorbitant, then he should reject it.

Otherwise stated, the Secretary required express statutory authority in addition to what he already had under

R.S. §§441, 463, and 2103 in order to cancel existing contracts even for fraud or extortion. What the Secretary purported to find in the present case on November 1, 1963, fell far short of either; but even assuming the very worst for purposes of the present discussion, that worst would have been of no avail in the absence of additional legislation.

That is why we deem the Act of April 27, 1874, so important. It proves beyond any possibility of effective contradiction that, when the Secretary first passed on the contract in suit, and approved it conditioned on nine changes therein (JA 48-50), his powers over that contract were exhausted. Thereafter he was no longer free to insist on modifications not independently agreed upon by the parties thereto.

Fifth. Once again (Sec. Br. No. 18338, p. 19; Sec. Br. 41-42) the Secretary invokes the Act of June 26, 1936, now 25 U.S.C. §81a.

But that statute is expressly limited by its terms, not only to "contracts or agreements approved prior to June 26, 1936"—which is not the contract in suit—but also to such contracts as were originally violative of the requirement of clause "Fifth" of R.S. §2103 that all attorneys' contracts with Indians should have a fixed time to run. It was precisely because such contracts had been executed prior to June 26, 1936, in violation of R.S. §2103, that the Secretary had power to cancel them under §81a. The proviso to the 1936 Act has no other meaning, and is not susceptible of any other meaning; indeed, the Interior Department has twice read the 1936 legislation to be limited (precisely as we have here indicated (Cohen, *Handbook of Federal Indian Law*, 281; U.S. Dept. Int., *Federal Indian Law*, 485-486)).

Sixth. The Secretary's renewed reliance (Sec. Br. No. 18338, p. 17; Sec. Br. 40-41) on Sen. Rep. No. 8, 83d Cong., 1st sess., is similarly misplaced.

That report, after castigating particular lawyers' conduct in severe terms, did not suggest or even intimate that the Secretary of the Interior should administratively undertake to suspend the principal offender or undertake to terminate his contracts with his several Indian clients; to the contrary, it said (p. 24):

"The subcommittee recommends that the Attorney General, as the representative of the Government in the courts of the United States, bring Mr. Curry's conduct to the attention of those tribunals which should properly review his conduct."

That is to say, the Subcommittee followed the land patent analogy, *viz.*, that so long as the Secretary of the Interior retains jurisdiction of particular land, his administrative orders concerning it are subject to revision. But issuance of the patent terminates his jurisdiction; deficiencies disclosed thereafter can only be remedied by action in the courts. See *West v. Standard Oil Co.*, 278 U.S. 200, 210-212.

In Sen. Rep. No. 8, 83d Cong., 1st sess., the Subcommittee applied the same concept to Indian contracts: Prior to his approval of such a contract, the scope of the Secretary's inquiry is very broad. But, just as he must resort to the courts to cancel a patent for land once that patent has been issued, so he cannot administratively revoke an approval of an attorney's contract with an Indian tribe that he or his predecessors have once given.

Seventh. These are not novel concepts; they were applied by the Department of the Interior in this very case—until the General Counsel rejected the Secretary's "constructive solution" that he resign (Fdg. 35, JA 2652).

In his October Memorandum, as this Court has noted (JA 357-359), Solicitor Barry pointed out that only the Navajo Tribal Council could act to terminate the contract,

that the Advisory Committee had no termination authority, and that the Secretary's powers in the premises were limited to recommending cancellation to the Tribal Council and to approving the Tribal Council's action in the event it cancelled the contract pursuant to the terms thereof. (His later conclusion that the Secretary had power to cancel administratively was rested, not on additional legal authorities, but on the Secretary's command; see Fdg. 36, JA 2652, and Op., JA 2616.)

Indeed, this record shows that "inquiry made at the Solicitor's direction disclosed that the present case represented the first instance of an attempt by the Secretary to cancel * * * a previously approved contract" under R.S. §2103 (Fdg. 43, JA 2655). The cited statute having now been on the books more than 90 years, the present case falls within Chief Judge Cardozo's off-quoted comment, "Not lightly vacated is the verdict of quiescent years" (*Coler v. Corn Exchange Bank*, 250 N.Y. 136, 141, 164 N.E. 882, 884).

As we have said, the heart of this case is the scope of the Secretary's powers, powers that the foregoing review of the statutes, their legislative history, and the long-settled administrative practice conclusively demonstrate to be insufficient to justify administrative cancellation of an approved Indian contract. The correctness of this Court's earlier decision is accordingly confirmed in all respects, and while the proliferation of the Secretary's remaining arguments requires detailed reply from us to show their inapplicability, this case turns—and his contentions fall—on his lack of power in the premises.

B. The Secretary was properly enjoined because, in excess of any powers conferred upon him by law, he was tortiously interfering with a contractual relationship.

The thrust of the Secretary's arguments insofar as they proceed beyond the issue of power simply confuse and obfuscate the two very simple but basic principles on which both the complaint and the two injunctions rest.

First, when a public officer invades private rights while acting beyond the scope of his authority, appropriate equitable relief is available, including injunctive relief. E.g., *Philadelphia Co. v. Stimson*, 223 U.S. 605; *Harmon v. Brucker*, 355 U.S. 579; *Bland v. Connally*, 110 U.S. App. D.C. 375, 293 F. 2d 852.

Second, interference with a contractual relationship without legal justification is actionable, and will be enjoined. E.g., *Arkansas v. Texas*, 346 U.S. 368, and cases there cited.

Significantly, the Secretary does not question these basic propositions. But his arguments, which we shall now proceed to consider, show that they utterly ignore the circumstance that the gravamen of the complaint is interference with the contract, and that the thrust of the injunction is protection of the contract.¹²

¹² In this connection, we should add that since the contract the Secretary sought to cancel and the courts have now protected was the one made in 1957 (JA 29-50), his repeated references to (Sec. Br. 3-4, 44-46) the earlier 1947 contract, which was fully executed on both sides when it expired by its terms in August 1957 (JA 22-28), are utterly irrelevant; and that the same is true of his mention of the interim 1957 contract as one that never received secretarial approval (Sec. Br. 4, 45). The Secretary has overlooked the fact that the 1957 contract, which was not signed until October 1957 (JA 47-48) nor approved until November (JA 48-50), was in fact back-dated to August 8, 1957 (JA 29, 35, 39), the date on which the earlier contract had expired.

C. Inasmuch as the final decree simply protects the contract between the General Counsel and the Navajo Tribe of Indians by enjoining third party interference with its performance, the district court's action is not properly subject to the Secretary's extravagant criticisms that the injunction gives the Tribal Council a free hand and makes it superior to the Secretary, or that the injunction involves a denial of Federal supervision, or that the injunction unreasonably seeks to control the Secretary's discretionary authority, or that it seeks to coerce the personal services of an attorney.

Once attention is directed to, and firmly riveted on, the gravamen of the present complaint and the thrust of the relief granted pursuant thereto, the Secretary's extravagant criticisms of the decree now under review are shown to be completely unfounded.

We have here a contract between an attorney and his client. The client is the Navajo Tribe of Indians—and parenthetically we confess ourselves astounded by the suggestion of the Secretary (Sec. Br. 34, 35) that the Tribe is either a “fictional body” or “entity”; an unbroken line of decision, from *Worcester v. Georgia*, 6 Pet. 515, through *Warren Trading Post v. Tax Commission*, 380 U.S. 685, reaffirms the proposition that Indian Tribes have legal personality. The Navajo Tribe of Indians is no more of a fiction than is the United States of America. But, like the United States, the Navajo Tribe can act only through agents; and here the Tribe acted through its governing body, the Navajo Tribal Council (2 N.T.C. §101), which alone is empowered to enter into attorney contracts (2 N.T.C. §1173(c)).

Moreover, we have here a contract that by its express provisions can be terminated, on behalf of the Tribe, only by the Tribal Council.

Next, the case deals with an interference with that contract, on the part of the Secretary, who was not a party

thereto, and with the injunction that forbids him to interfere with the performance of the contract.

Once these guidelines are kept in mind, the Secretary's objections evaporate like fog before the sunshine.

1. Primarily, the Secretary asserts, in varying forms of words (Sec. Br. 21, 29), that the injunction involves a "usurpation by the court of the powers and duties of the Secretary of the Interior and of the tribal authorities," and that by reason of the injunction, "tribal self-government and federal supervision exist only to the extent and in the manner to which the district court thinks they should."

These exaggerations beg the question, which is that of the Secretary's power. If indeed he had power to terminate the contract as he set out to do, the strictures might be justified. But since, as this Court has held and we have demonstrated anew, the Secretary has no such power, they are groundless. After all, tortious and indeed lawless Secretarial interference can hardly be equated with lawful Federal supervision.

2. The contention that the injunction gives the Tribal Council a free hand (Sec. Br. 26) is verbiage and nothing more. The Tribal Council is just as much under the Secretary's lawful supervision as it always was. But such supervision does not include termination of the present contract; only the Tribal Council has power to do that.

3. The same answer applies to the groundless exaggeration (Sec. Br. 21-27) that the injunction makes the Tribal Council superior to the Secretary. That is true only in respect of this contract—for the reason that under its provisions—which had been duly approved by a Secretary of the Interior—the Tribal Council may terminate it, but the Secretary lacks power to do so.

4. Likewise rhetorical is the complaint (Sec. Br. 30-32) that the injunction unreasonably seeks to control the

Secretary's discretionary authority. Since the Secretary has no power to terminate administratively a duly approved Indian contract, what he sought to do here was beyond the outside limits of any discretionary authority vested in him. His action was therefore properly enjoined.

5. Nor is the injunction exceptionable for coercing the personal services of an attorney (Sec. Br. 32-36). We do not, of course, quarrel with the Secretary's generalizations (Sec. Br. 32, 33) that "the coercive powers of an equity court cannot be invoked to enforce a contract for personal services," or that "A client has the absolute right to discharge an attorney and end their relationship."

But neither proposition is remotely involved here. The client in this case is neither the Secretary nor the Chairman: under the plain terms of the contract (JA 35, 47) the client is the Navajo Tribe. And under the terms of the Secretarially approved Code, only the Tribal Council is competent to deal with attorney contracts (2 N.T.C. §1173(c)), as indeed the Secretary's lawyer recognized (JA 210).

Therefore this injunction neither seeks to enforce a contract for personal services against a party thereto, nor does it interfere with the client's right to end the attorney-client relationship. The client is quite content with its attorney, whose opponents in the Council have never been able to muster a majority vote against him (Fdg. 7, JA 2644; Fdg. 24, JA 2649; Fdg. 27, JA 2650; Fdg. 36, JA 2652).

The vice, the obvious vice in the Secretary's contention, is in its refusal to recognize that restraining a tortfeasor from interfering with an attorney-client relationship does not improperly enforce the performance of an attorney-client contract—any more than *Lumley v. Gye*, 2 F. & B. 216, where Gye was restrained from enticing away Mlle. Wagner, can be said improperly to have compelled the performance of a contract for personal services.

6. Similar considerations apply to the further contention (Sec. Br. 35, 42-43) that the injunction requires the Chairman to accept the General Counsel as his official lawyer.

The General Counsel is the Tribe's lawyer; he has a contract with the Tribe; and under the Navajo Tribal Code it is the Tribal Council, not the Chairman, that is empowered to select attorneys (2 N.T.C. §§281, 284, 1173(c)). The Chairman's quarrel in that respect is not with the injunction, it is with the Tribal Code—from which, it should be noted, he derives his official position, his official status, and all of his own authority.

7. Finally, the Secretary objects to the district court's suggestions that he refrain from further attacks on the General Counsel, complaining that the court is undertaking "to tell the Secretary how it thought the matter should be solved" (Sec. Br. 28). But, here again, all that the district court urged was that the Secretary respect the terms of the contract, and that he comply with the injunction that forbade his interference with the performance of the contract.

Why a suggestion that a public officer obey the law should evoke the sense of outrage reflected in the Secretary's brief here (Sec. Br. 28-29) we must leave to others.

It is only necessary to add that the district court's consistent view, that the controversy between the Chairman and the General Counsel should have been submitted to the Tribal Council, a view that the Secretary so violently attacks here (Sec. Br. 20, 28-29), was precisely the view that the Secretary's own Solicitor expressed before tempers were roused: Solicitor Barry pointed out in his October Memorandum (Fdg. 33, JA 2651-2652; JA 209, 210, 217) that only the Tribal Council could terminate the contract and that the Secretary was limited to recommending termination to that body.

D. Similarly, since the Navajo Tribe, the other party to the contract, was not a necessary party in the present proceeding, the injunction involved no intrusion into that Tribe's internal affairs.

It is plain that, in a *Lumley v. Gye* action by one party to a contract against the tortfeasor interfering with the contractual relationship, the other party to the contract is not a necessary party to the proceeding. *Arkansas v. Texas*, 346 U.S. 368, 369-370.

Accordingly, the district court twice ruled, first on preliminary and then on permanent injunction, that the Navajo Tribe was not a necessary party to the present action (Conc. 3, JA 348, 2675)—and the Secretary on neither appeal undertook to question that holding.

It follows that, since the Navajo Tribe of Indians is not a necessary party to this action, wherein the force of the court is directed solely against the Secretary (and his subordinates), nothing ruled herein can possibly affect the internal affairs of the non-party. The necessary consequence is that the Secretary's lengthy animadversions, that the injunction involves an unwarranted intrusion into the internal affairs of the Tribe (Sec. Br. 27-30), are without logical support.¹³

¹³ The holding of *Littell v. Nakai*, 344 F. 2d 486 (C.A. 9), certiorari denied, 382 U.S. 986, on which the Secretary dwells at some length (Sec. Br. 27), was simply that a Federal court had no jurisdiction to entertain a similar action against the Chairman. Obviously, whatever was said about internal affairs of the tribe was dictum; and, equally obviously, the denial of certiorari imported no judgment by the Supreme Court on the merits (e.g., *Brown v. Allen*, 344 U.S. 443, 456; Warren, C.J., in *Martin v. Texas*, 382 U.S. 928, 929), however much the Secretary would prefer to think otherwise (Sec. Br. 27). For what it is worth, at least one disinterested commentator considers the Ninth Circuit to have been in error on the jurisdictional issue. 79 Harv. L. Rev. 851.

As we have said, the heart of this case, on which the basic validity of the decree rests, is that the Secretary had no power to cancel the present contract administratively. Accordingly, he was properly restrained from further interference with the performance of that contract. Significantly, the Secretary's exaggerated and far-fetched criticisms precede rather than follow—and therefore assume—his arguments on power.

II. TO THE EXTENT THAT THE FACTS AND ISSUES IN DISPUTE BETWEEN THE PARTIES BECOME MATERIAL IN THE LIGHT OF THE SECRETARY'S LACK OF POWER TO CANCEL, THEY DEMONSTRATE NOT ONLY THAT THERE WERE NO GROUNDS FOR TERMINATION BUT ALSO THAT THE TERMINATION ACTION WAS NOT TAKEN IN GOOD FAITH.

A. Since a public officer cannot enlarge his powers by defaming his opponents, the Secretary's charges did not bar the General Counsel from judicial relief in limine.

If the mere circumstance that the making of derogatory charges against the General Counsel bars the latter from relief against the Secretary's unauthorized action, as the Secretary now argues (Sec. Br. 43-44), then the latter by fashioning such allegations is enlarging his powers, because then the object of his defamatory excesses would be thereby rendered incapable of contesting official usurpation.

Fortunately, that has never been the law.

The pleadings show that the Secretary simply made charges: the operative words in par. 5 of the Secretary's Second Defense (JA 1030) are that the act of termination "involved charges of a serious nature * * * and * * * of such a nature that the defendant, on information and belief, asserts the plaintiff is not entitled to equitable relief."

But, just as it is still the law that mere accusation does not amount to proof, so it is the law that the making of

charges of a serious nature does not bar the person accused from equitable relief against official excesses. *Peters v. Hobby*, 349 U.S. 331; *Service v. Dulles*, 354 U.S. 363; *Vitarelli v. Seaton*, 359 U.S. 535.

In each of the cases cited, the Secretary concerned made "serious charges" against the employee. Mrs. Hobby found that there was a reasonable doubt as to Peters' loyalty; Service was removed for the same reason; while Vitarelli was dismissed because his continued employment would be "contrary to the best interests of national security." Surely there could be no more serious charges than these. Consequently, if a person against whom serious charges are made is so far blackened by the accusation as to be barred from resort to equity, then all three employees should have been barred *in limine*. Yet each prevailed, not after an inquiry had first demonstrated the falsity of the charges made against them, but without any such inquiry, on the ground that the respective Secretary either lacked power to act, or that the regulations under which he acted were unauthorized by statute.

That is to say, the Supreme Court has already necessarily rejected the Secretary's defense here that one against whom serious charges have been levelled by an official cannot have equitable relief against that official for exceeding his powers. Vitarelli was suing for an injunction, Peters and Service for declaratory judgments (which of course are governed by equitable principles, see *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 300).

For the rest, the Secretary's arguments under the present heading (Sec. Br. 43-44) hardly rise above the assertion that unclean hands are hands that are unclean.

But it is not necessary to dwell on the asserted *in limine* bar, which indeed this Court necessarily rejected on the first appeal. For now the charges have been tried, and the district court has concluded, after a plenary trial, that

the "evidence here fails utterly to prove the allegation" "that the plaintiff has unclean hands" (Conc. 17, JA 2678).¹⁴

We can easily demonstrate, in rather summary fashion, the correctness of that conclusion.

B. The charges made by the Secretary against the General Counsel were groundless in both law and fact.

1. Increase in Compensation Effected by Amendment No. 9

As we have shown, *supra*, page 10, the five-year limitation on the increase in the General Counsel's compensation was a condition imposed by the Department. Four and not five years later, and when the General Counsel was in Turkey, the Tribal Council voted to increase his compensation, not by way of budget provision, but as a formal amendment to their contract (Fdg. 50, JA 2656; JA 90-95). Both the Tribal Chairman and the General Counsel submitted to the Interior Department memoranda justifying the increase, which after some four months' consideration in the Department was personally approved by the appellant Secretary with a statement that "I find it

¹⁴ The Secretary badly misreads the opinion below in asserting (Sec. Br. 13-14) that the district court held that "since the Secretary is not a party to the contract, he has no standing to raise that defense [of unclean hands] in any event."

Nothing whatever in Point III of the opinion (JA 2621-2626), entitled "Does the Plaintiff Seek Equitable Relief with Unclean Hands?," lends support to the Secretary's characterization. The district court answered its own question with a resounding negative—on the merits. What the court said was that specific performance would not result where the defendant was not a party to the contract (JA 2621-2622). Or, as we paraphrased the same point earlier (*supra*, p. 32), the General Counsel is not seeking specific performance against the Secretary, he is seeking to bar that Secretary's third party interference. Otherwise stated, *Lumley v. Gye* did not involve any attempt by Lumley to obtain specific performance of his contract with Mlle. Wagner.

to be in the best interest of the Indians" (Fdgs. 51-52, JA 2657).

Amendment No. 9 was neither mentioned in Barry's October Memorandum, nor referred to by the Secretary in his October conference with the General Counsel (Fdg. 53, JA 2657). It first appeared as the subject of an accusation following the General Counsel's refusal to resign, after the Secretary had directed the preparation of new memoranda (Fdgs. 36-39, JA 2652-2654), and after the Secretary had formed a determination to get rid of the General Counsel (Fdgs. 45-47, JA 2655).

In Barry's second November Memorandum, Amendment No. 9 received a single paragraph (JA 236), one that contained a misstatement of law obvious even to a first year law student, viz., that the compensation provision of the contract as approved by the Secretary "required him, as a matter of law, to work for \$25,000 per year for five years." This memorandum failed to disclose either that Amendment No. 9 had been under discussion in the Department for some four months or that it had personally been approved by the present Secretary (Fdgs. 51-52, JA 2657).¹⁵

The district court found as a fact (Fdg. 55, JA 2657) that "There was nothing before the Department of the Interior in November 1963, regarding Amendment No. 9 to the plaintiff's contract that had not been before it in December 1961, when that Amendment was approved by the defendant Secretary"—and although the Secretary attacks that finding as unsupported, he quite fails to call attention to a single document by way of contradicting it (*infra*, pp. 51-52). Moreover, the district court concluded as a matter of law that whatever restrictions on changes in compensation had

¹⁵ The same paragraph (JA 236) also contains a statement of fact, "that it was represented on his behalf that the five-year period had expired," which has since been disproved (Fdg. 50, JA 2656). But in view of the true meaning and effect of the five year limitation, we need not dwell on this point.

been imposed by the Secretary, the parties were free as a matter of law to waive the limitation, subject to approval under R.S. § 2103 (Conc. 9, JA 2676), and that, in any event, "the charges made against the plaintiff in connection with the adoption of Amendment No. 9 would not have constituted good cause for termination" (Conc. 10, JA 2676).

Now, in this Court, the Secretary looses a veritable far-rago of charges of bad faith and breach of trust, based on assertions of non-disclosure (Sec. Br. 51-52)—but resting on his own misquotation of the contract to which we have already called attention (*supra*, p. 10, note 9).

We think that the chronology of the Secretary's dealings with Amendment No. 9, first his approval following extended investigation, then his silence, later his expression of disapproval, and now his allegations of a breached fiduciary relationship, argue eloquently for the conclusion that his charges under Amendment No. 9 did not represent a fresh complaint based on new and substantial evidence, were adduced simply as a makeweight to support the Secretary's determination (Fds. 45-47, JA 2655) to get rid of the General Counsel, and were therefore not made in good faith.

The groundlessness of the charge is highlighted when other approved amendments are borne in mind. As has been seen, the five year limitation applied also to increases in Mr. Alexander's compensation. But within two and again within three years, the limitation was twice lifted for Mr. Alexander's benefit (Amendments 5 and 6, JA 68-79). That was undoubtedly the reason why, when the limitation had only one more year to run, the Secretary and his advisers approved Amendment No. 9, lifting it in respect of the General Counsel. It was only after the latter refused to resign that the additional Amendment No. 9 charge was fashioned, a charge that, as the relevant documents plainly demonstrate, rests in part on an elementary mistake of law

and in part on utter disregard of similar amendments previously approved. It surely casts a revealing light on the Secretary's *bona fides* that to this day neither he nor his subordinates have ever mentioned the earlier lifting on two separate occasions of the five year limitation in respect of the other lawyer to whom it applied.

2. Use of General Counsel Attorneys on Claims Cases

As has been shown (*supra*, pp. 11-12), the services of a number of general counsel attorneys were used, although in violation of the express prohibitions of the contract, in furtherance of the Navajo Tribe's claims cases. In his October Memorandum, Barry suggested that such use be made the subject of a set-off, but in his November Memoranda the same factor was put forward as a ground for terminating the contract (Fdg. 60, JA 2659).¹⁶ The district court concluded that, in all the circumstances (Fdg. 62A, JA 2659-2660), such use of general counsel attorneys did not constitute good cause for termination of the contract in any event, and that an appropriate offset at the conclusion of the claims work would amply protect the Tribe, as indeed Solicitor Barry had originally suggested (Conc. 11-12, JA 2677).

In this Court, the Secretary rises to a crescendo of abuse (Sec. Br. 47-50), speaking of commingling of funds, "misappropriation of a client's funds," "conversion to his own use of the property of his client," and alleging that this is a case "where general counsel attorneys were overpaid by the plaintiff so far as tribal work was concerned because

¹⁶ The statement in Barry's first November Memorandum that no Tribal attorneys other than three named persons had been authorized to perform claims services (JA 233) was untrue in fact, because it failed to disclose the authorizations for McPherson and Wolf (Fdg. 57, JA 2658).

their activities were directed to work for the plaintiff individually on claims matters."

The Secretary's near-hysterical hyperbole flattens completely when exposed to the facts.

First and foremost, there can be no question here of any commingling of funds; in all the years since 1947 that this appellee has been the Navajo Tribe's Claims Attorney, he has "never received a penny of compensation for his labors in that capacity" (Fdg. 35, JA 2652; Fdg. 74A, JA 2664). There simply were no funds to commingle.

Second, when general counsel attorneys were used on claims cases, they did not "work for the plaintiff individually" as the Secretary now mistakenly asserts (Sec. Br. 50). They worked for the Navajo Tribe, and, since plaintiff's recovery in the event of success was limited to 10% (JA 40, ¶b), it is plain that 90% of any recovery by reason of such general counsel attorneys' work would inure to the benefit of the Tribe.¹⁷

Third, the basic fallacy of the charge under this heading lies in Barry's twice asserted conclusion (JA 233, 238) that "The General Counsel is obligated to provide, at his own expense, any other attorneys which are required for claims work under the Contract."

That conclusion is quite without record support. The words in the original contract (JA 41)—"and other associate attorneys, retained by the said Littell at his own expense"—were words of recital, not of obligation. Later, when there were no more such attorneys, and the recital no longer reflected the facts (Pl. Ex. AG, ¶12, at JA 2292-

¹⁷ The same confusion between the Tribe and its General Counsel appears at Sec. Br. 55, where affirmation of the *Healing v. Jones* judgment by the Supreme Court, 373 U.S. 758, is characterized as "rejecting plaintiff's appeal." The report plainly shows that plaintiff was simply counsel for the Tribe; it was the Tribe's appeal, not the plaintiff's.

2293), this clause was deleted by Amendment No. 11 (JA 103, ¶3B).¹⁸

In short, the contentions made on behalf of the Secretary under the present charge are without any factual foundation whatever.

3. Classification of *Healing v. Jones* as a Claims Case Effected by Amendment No. 11

Finally, the Secretary alleged that the General Counsel acted unethically in classifying *Healing v. Jones*, 174 F. Supp. 211 (D. Ariz.), 210 F. Supp. 125 (D. Ariz.), affirmed, 373 U.S. 758, as a claims case in Amendment No. 11, a charge that the district judge after careful analysis held to be groundless (Op., JA 2624-2626; Fdgs. 63-75, JA 2660-2664; Conc. 13-16, JA 2677-2678).

Briefly, the cited findings show that the proper classification of this litigation was invited by the Undersecretary of the Interior, and that Solicitor Stevens, who had originally ruled to the contrary, held finally that it was a claims case after examining the minutes of the Advisory Committee meeting of September 24, 1957. Thereafter *Healing v. Jones* was designated as a claims case by Amendment No. 11, an amendment that was approved for the Department in July 1962 following personal approval by Solicitor Barry. But in November 1963, without any further materials before him, Barry asserted that the adoption of Amendment No. 11 and its classification of *Healing v. Jones* as a claims case constituted misconduct on the General Counsel's part so gross as to require termination of his entire contract.

In the face of the district court's conclusion that the General Counsel's conduct in connection with this transaction was entirely proper, the Secretary returns to the assault.

¹⁸ We cannot forbear to note the bias reflected by Barry's inconsistency that while the General Counsel did not need a contingent fee from a tribe as wealthy as the Navajos, he was still required to provide all claims attorneys at his own expense (JA 238).

Primarily, the Secretary asserts (Sec. Br. 55-56) that the General Counsel did not make full disclosure in connection with Amendment No. 11. But this is the pot calling a bur-nished kettle black, and with a vengeance, because the record shows a consistent course of nondisclosure and of misstate-ment in connection with this very transaction, not on the General Counsel's part, but by the Secretary and by his Solicitor.

First, Barry never cited the opinion in 174 F. Supp. 211, where the United States had asserted a jurisdictional de-fense in *Healing v. Jones* (Fdgs. 69-70, JA 2662-2663). If the United States had succeeded in its active opposition to the Navajo claims there, no recovery whatever for the Tribe would have been possible.

Next, Barry said that the favorable Stevens opinion "evidently relied on statements in Mr. Littell's letter" (Fdg. 71, JA 2663). This was untrue, because the Stevens letter showed on its face that its conclusion rested on the minutes of the Advisory Committee meeting (Fdg. 65, JA 2660-2661; Pl. Ex. I, JA 2060).

Third, while Barry correctly said that "The Minutes of the Tribal Council meeting * * * at which the contract was approved, show that no consideration whatsoever was given to this matter," his statement was palpably misleading, because it was the Advisory Committee and not the Tribal Council that negotiated the contract (Fdg. 66, JA 2661).

Fourth, Barry nowhere disclosed in any of his memo-randa that he had personally concurred in Amendment No. 11 prior to its receiving Secretarial approval (Fdg. 66A, JA 2661-2662).

Finally, as we have already pointed out (*supra*, page 13), the Secretary here twice makes the demonstrable misstate-ment that the September 1957 Advisory Committee minutes were not discovered by the Department until November 1963.

The Secretary's other allegations under the present heading accordingly do not seem to us to require further detailed analysis.

The essence of the *Healing v. Jones* charge is that the General Counsel is castigated for classifying this litigation as a claims case and for effecting recognition of that classification in Amendment No. 11, this in the face of Solicitor Stevens' opinion that it was a claims case, this in the face of Departmental approval of Amendment No. 11 on Solicitor Barry's recommendation, this on the basis of no further facts or documents other than the misstatements and omissions contained in Barry's 1963 memoranda.

It is therefore not to be wondered at that the district court characterized the treatment the General Counsel has received at the hands of the Secretary and his subordinates as "brutal and shabby" (JA 2627).

Perhaps one more word needs to be said. We are not disposed to disagree with the district court's conclusion that the status of *Healing v. Jones* as a claims case or otherwise is not essential to a decision here (Op., JA 2626; Conc. 15, JA 2677).

But we cannot forbear to add that, in view of the circumstance that the Navajo Tribe would have received nothing if the United States had prevailed in its motion to dismiss that was overruled at 174 F. Supp. 211, *Healing v. Jones* was clearly a claims case within par. 2(b) of the contract, which specifically included "claims relating to the taking of, or failure to make available to said Indians, lands which the United States is under obligation to make available to said Tribe and which said Tribe has the legal and/or equitable right to own, possess, or use" (JA 37-38).

Significantly, the Secretary admitted under oath that he was not familiar with the claims provisions of the General Counsel's contract (JA 1690, 1699).

C. Contrariwise, the Secretary's purported termination of the contract was action taken in demonstrable bad faith.

At the conference on October 11, 1963, at which the General Counsel was confronted with Barry's October Memorandum, the Secretary urged him to resign by way of "constructive solution"; and when the General Counsel then pointed out that this would damage the Navajos because vital claims cases were pending, "the defendant Secretary said that he never intended that the plaintiff should resign as the Tribe's Claims Attorney but only as General Counsel" (Fdg. 35, JA 2652).¹⁹

In other words, the plaintiff should make available to others his assured \$35,000 annual retainer, and content himself with the claims work, for which since 1947 he had never received any compensation whatever (Fdg. 35, JA 2652; Fdg. 74A, JA 2664).

It was this circumstance that underlies the allegation of "subterfuge" in the complaint (¶10, JA 6); it was this circumstance that prompted the district court, after full discussion, to say that it could not "conclude that the Secretary really believes Littell to be as reprehensible as he would have the Court believe" (JA 2622).

When the General Counsel then refused to resign, the Secretary was determined to get rid of him none the less (Fdgs. 45-46, JA 2655), and directed Barry to prepare new memoranda (Fdg. 36, JA 2653). The district court noted (Op., JA 2618) that "the decision to circumvent the Tribal Council, the only authorized legal entity legally capable of terminating the contract, was motivated by the realization

¹⁹ Although the Secretary denied on the stand that he asked the General Counsel to continue as Claims Attorney (JA 1636), his counsel requested the district court to find that "Also, during their conference on October 11, 1963, the defendant suggested plaintiff resign as General Counsel and retain the claims work" (Sec. Req. Fdg. 47). We submit that this was a Freudian rather than a forensic slip on the part of the Secretary's counsel.

that more than half of the 74 elected members of that body wanted to keep Littell," and that "the change in attitude by Barry and the Secretary was not motivated by a recognition of any existing legal power to cancel the contract, but by their creation of an assumed power not authorized by law but only motivated by their desire to 'get rid of Littell.' "

We have moreover demonstrated, in full detail, the omissions, half-truths, and misstatements in Barry's two November Memoranda (*supra*, pp. 38, 40-41, 43), the conclusions of which the Secretary adopted without further or independent research (JA 1641, 1676). Those Memoranda were, in plain English, deceitful—and we use the word advisedly, not as an epithet, but as a conservative diagnosis.

We have also demonstrated, at some length, the correctness of the district court's conclusion, reached after analysis of all the charges made by the Secretary to justify his termination of the contract, that they were, severally and collectively, groundless and not cause for termination even by one with power to terminate (Op., JA 2626; Fdgs. 49-75, JA 2656-2664; Conc. 9-17, JA 2676-2678).

Finally, although the Secretary wrote in his termination letter that "you shall have a full and fair opportunity to present to the Solicitor any evidence which you have by way of explanation or exculpation" (Fdg. 39, JA 2653-2654), in fact the Secretary had already determined to remove the General Counsel (Fdgs. 45-46, JA 2655), and indeed testified under oath that he "didn't see how Mr. Littell could explain it even if he chose to" (JA 1644). The district court accordingly found that neither the offer to submit evidence just quoted nor some additional questions submitted by the Solicitor thereafter "were submitted with any expectation that the plaintiff would alter the conclusions that the Secretary and the Solicitor had already reached" (Fdg. 47, JA 2655), and by way of conclusion, that "Plaintiff could not in point of actual fact have ob-

tained relief from his suspension within the Department of the Interior after November 1, 1963" (Fdg. 48, JA 2656).

Yet the Secretary had the effrontery—no other term is appropriate—to urge on the courts that the General Counsel was barred from judicial relief for failure to exhaust administrative remedies! See Sec. Br. No. 18338, p. 13, n. 1; Sec. Rep. Br. No. 18338, pp. 12-14; Sec. Ans., Third Defense, JA 1030; Op., Pt. II, JA 2620; cf. Sec. Br. 9.

Thus the essential bad faith underlying the termination action was compounded by the hypocrisy of the Secretary's first suggesting and then insisting that the General Counsel apply for relief to those who after traducing him had then closed their minds on that subject.

In short, and this is by way of summary on the entire record, the unclean hands in the present controversy are not those of the plaintiff, they are the hands of the Secretary—and, *inter alia*, those of Solicitor Barry.

III. THE DISTRICT COURT'S FINDINGS OF FACT, FAR FROM BEING "CLEARLY ERRONEOUS," ARE IN EVERY RESPECT FULLY SUSTAINED BY THE EVIDENCE.

In his statement of points (Sec. Br. 15), the Secretary assails no less than 30 numbered findings of fact made by the district court. Nine of these—Fdgs. 22A, 24, 29, 47, 48, 49, 66, 73, 106—are not mentioned further in his brief; we shall regard those as having been waived. Two additional findings, Fdgs. 62A and 81, were not assigned as error, but are now attacked in the argument. And 27 additional findings, Nos. 87-102, are challenged as irrelevant.

While it is obvious from the brevity of the conclusory assertions in Point V of the Secretary's brief (pp. 56-58) that he falls far short of even a superficial showing that any of the findings attacked are "clearly erroneous" within the familiar provision of Rule 52(a), F.R. Civ. P., it will become apparent to the Court, as indeed it did to us, that

the Secretary's basic objections to the findings in question are substantive rather than evidentiary: He does not like the findings, essentially because he does not like the testimony on which they rest, even when that testimony came from himself or from his own witnesses.

Nonetheless, we think that we can best assist the Court by dealing seriatim with every finding that the Secretary mentions in argument. That course not only has the advantage of leaving nothing to conjecture, it will demonstrate the utter groundlessness of the Secretary's assault on the district court's findings of fact.

1. Fdg. 9 (R. 2644) deals with the Advisory Committee: it is attacked (Sec. Br. 56) because "misleading in its reference to the Advisory Committee as a 'stacked body' and the change in its constitution in 1964 is irrelevant here."

The reference to the Advisory Committee as a "stacked body" rests on the Secretary's own characterization of that Committee, in those precise words, while testifying (JA 1656), and we fail to understand how he can now be heard to complain that the district court took him at his word. After all, *Falsus in uno, falsus in omnibus*, is a rule that is permissive rather than mandatory. 3 Wigmore, *Evidence* (3d ed. 1940) §§ 1008-1015.

As for the change made in 1964, which shows that the Tribal Council later undertook to unstack the Advisory Committee, this was not deemed irrelevant when it was testified to at the trial (JA 1863-1864, 1874), nor when the Secretary mentioned it in his own brief (Sec. Br. 3, note 1), nor when the district court recurred to it in Finding 117 (JA 2674).

2. So much of Fdg. 12 (at JA 2646) as states that "Nakai wanted Schifter to become the new general counsel," is objected to as not supported by substantial evidence (Sec. Br. 56-57).

To the contrary, it rests on the testimony of two of the Secretary's own witnesses, his Solicitor, Barry (JA 1787), and his "old friend" (JA 1008), Barry de Rose (JA 1316, 1328).

3. Fdg. 20 (JA 2648), dealing with the disagreement over the housing resolution in the spring of 1963, is objected to (Sec. Br. 57) as assuming an erroneous legal conclusion.

This finding is not conclusory at all. It is a recital of basic facts that does not depend on any kind of legal conclusion. It recites what a number of persons said and did and had in their minds; whether or not in so saying and doing the persons named made a mistake of law does not and cannot vitiate the finding; all that matters is that its recitals are supported by evidence.

This particular finding is amply supported, as follows: Plaintiff's return (JA 1483); furnished copy (JA 1484); opposition to clauses (JA 1491-1492); reasons for opposition and advice to Council (JA 1403-1404); return to Washington and conference with Deputy Housing Administrator (JA 1404-1405, 1492-1495); conference with Hayden (JA 1405); telegram to Nakai (Pl. Ex. AE, JA 2276-2278; JA 1404-1405, 1494-1495, 1512); deterioration of relations (JA 910-912, 1495); failure of Nakai to present telegram to Council (JA 1406); passage of Housing Ordinance (Pl. Ex. AC, JA 2259-2275; JA 1490).

4. The last sentence of Fdg. 21 (JA 2649), stating that "In the course of his conversations with Mrs. Wauneka, De Rose suggested that she could obtain employment under the Housing Authority," is assailed (Sec. Br. 57) as "not supported by substantial evidence."

To the contrary, the conversation on this point rests on the testimony of one of the Secretary's witnesses, De Rose himself (JA 1327):

"Q. Did you suggest to her that she could get a job and that you would take her name to the Chairman to recommend her for the job?

"A. I believe I did.

"Q. And you told her that you were going to have a meeting with the housing authority and you would mention her name?

"A. I probably said that."

5. In order to appreciate the next objection, to Fdg. 36 (JA 2652), it is necessary to set it out in full:

"36. Plaintiff refused to resign in either capacity. Thereafter, the defendant Secretary directed his Solicitor to prepare new memoranda looking to termination of the plaintiff's contract by the Secretary without action by the Navajo Tribal Council. This direction was impelled by at least two factors: (1) plaintiff's refusal to resign, and (2) the realization that a majority of the Navajo Tribal Council were favorable to the plaintiff and would not vote to terminate his contract."

This is objected to (Sec. Br. 56) as "either erroneous, misleading, or irrelevant in whole or in part because * * * based on the mistaken motion that the supreme authority is in the Navajo Tribal Council."

It can be said with assurance that the finding is, very clearly, not erroneous; it is supported by the testimony of the Secretary's witness De Rose (JA 1317-1318):

"Q. Now, did anyone at the meeting with the Secretary on or about the 19th of June, 1963, say that the resolution would have to be passed by the Tribal Council?

"A. I don't believe they said it would have to be passed by the Tribal Council, but I believe someone suggested they get it passed by the Tribal Council.

"Q. Who said that? Who made that suggestion?

"A. I think the Secretary.

"Q. The Secretary?

"A. Yes.

"Q. When the Secretary suggested a resolution by the Tribal Council, what was said to him?

"A. I believe that was when Leo or Raymond, one of them, said that it would be impossible to get a

majority of the Tribal Council, because of Mr. Littell's influence on them, to pass the resolution.

"Q. And that was said to the Secretary on the 19th of June?

"A. To the best of my knowledge, yes.

"Q. And Mr. Barry was also there at the time?

"A. I believe he was."

It is also supported by the testimony of the Secretary's witness (and Solicitor) Barry (JA 1730):

"Q. Your first recommendation was that he [the Secretary] recommend termination to the Tribal Council, wasn't it?

"A. Yes, indeed. I asked Mr. Nakai to get the Tribal Council to terminate it.

"Q. What did Mr. Nakai say?

"A. He said he didn't have the votes."

And it is further supported by Barry's testimony at (JA 1746-1749), which is too long to quote in full.

The balance of the objection does not go to any factual aspect of Finding 36; the Secretary now objects that the district court (like this Court on the prior appeal, see JA 356-359) took at face value Solicitor Barry's original conclusion (JA 210, 217) that all power in respect of terminating the attorney contract was vested in the Navajo Tribal Council, and that the Secretary was limited to recommending action to that body.

6. Finding 55 (JA 2657), which points out that there was nothing before the Department in November 1963 regarding Amendment No. 9 to the General Council's contract (raising his compensation) that was not before it when the Secretary approved that amendment in December 1961, is attacked (Sec. Br. 57) as "not supported by evidence and is misleading in assuming that the Department had cause to doubt plaintiff's conduct in 1961, as it did in 1963."

But, since the Secretary fails to point to a single document that was before him in 1963 and was not before him

in 1961, when he approved Amendment No. 9 with the statement that "I find it to be in the best interest of the Indians" (Fdg. 52, JA 2657; JA 94), he cannot even arguably urge that the finding was wrong.

The balance of the objection simply underscores the demonstration already made in detail above, pp. 37-40, that the 1963 charge under Amendment No. 9 was not made in good faith.

7. Finding 58 (JA 2658-2659), which explains how a number of matters handled for the Navajo Tribe started out as general counsel work and then became claims cases, is attacked (Sec. Br. 57) as erroneous and as not a fact but a legal conclusion.

But the documented fact is that every word in Fdg. 58 is amply supported, by a mass of evidence (JA 1375-1388, 1554-1561, 1563-1574; Pl. Ex. AA, AS (not printed)), which was originally adduced by the Secretary, who never objected until the subject was more fully explored on cross-examination (JA 1564).

8. The next finding must also be quoted to appreciate the thrust of the objection. Finding 62 (JA 2659) reads:

"62. Insofar as the charge that the plaintiff improperly used general counsel attorneys on claims work involved their participation in *Healing v. Jones*, that charge was inconsistent in fact with the further charge that the plaintiff improperly classified *Healing v. Jones* as a claims case."

To this the Secretary objects (Sec. Br. 57), asserting that it is "argument, not fact, and is fallacious, since it is simply a matter of which breach of trust plaintiff committed, i.e., either *Healing v. Jones* was not a claims case, or general counsel attorneys were diverted from the work they were paid for. Plaintiff cannot have it both ways."

The record not only supports the finding, it shows that Solicitor Barry, under oath, admitted the obvious incon-

sistency (JA 1772). Actually it is the Secretary who wants to have the matter both ways.

9. The next finding assailed (though not included in the Statement of Points, Sec. Br. 15) must also be quoted; Fdg. 62A (JA 2659-2660) reads:

"62A. In view of the circumstances that the plaintiff has yet to submit a bill for services in *Healing v. Jones*, that the Tribe's governing body, the Navajo Tribal Council, has never complained of any irregularities in respect of the use of general counsel attorneys on claims work in the 20 months that have elapsed since those charges were first made by the Advisory Committee, and that a determination of whatever set-off or reimbursement may be due by reason of such use involves not only the examination of voluminous service records but also the separation of the entries thereon into claims and general counsel aspects of the several cases, no findings are being made concerning the extent of such use."

The objection made (Sec. Br. 56) is that this finding is "either erroneous, misleading, or irrelevant in whole or in part because * * * based on the mistaken notion that the supreme authority is the Navajo Tribal Council."

The following references support Fdg. 62A: No bill yet submitted (JA 1436, 1700); no complaint by Navajo Tribal Council (or by anyone else, Fdg. 79, JA 2665). The original charges under this heading are at ¶¶ 10-12 of Def. Ex. 1, at JA 1891; the service records are Def. Ex. 4-8, the tabulations are Def. Ex. 9-13, none printed. For the inaccuracies in the tabulations, see JA 1225-1229 and the admissions by the Secretary's counsel (JA 1229, 1882). The proposal that whatever is due be set off is in Barry's October Memorandum at JA 216; the proposition that the supreme authority is indeed in the Tribal Council and that the Secretary is limited to recommending termination to that body, see the same document at JA 210 and 217.

Significantly, the Secretary requested no findings concerning the extent to which general counsel attorneys were, in furtherance of the Tribe's interests, employed on claims cases.

10. Finding 68 (JA 2662) deals with the General Counsel's consistent disclosure to the Navajo Tribal Council, his client's governing body, that he regarded *Healing v. Jones* as a claims case, and states that "it is reasonable to conclude that the Tribal Council understood in consequence of this" that he was entitled to be compensated as provided in his contract for other claims cases.

The Secretary (Sec. Br. 57) objects, because "not supported by evidence, and contains argument that 'it is reasonable to conclude' which is erroneous."

The recitals in Fdg. 68 are fully supported by the following extracts from minutes of the Navajo Tribal Council's meetings: Pl. Ex. AII, AI, AJ, AK, AM, AN, AO, at JA 2294, 2295, 2297, 2299, 2300, 2301, 2303-2310, 2312-2314, 2330-2335, 2340, 2342.

The balance of the Secretary's objection reflects his lack of understanding of the standards governing this Court's review of findings of fact. The words "it is reasonable to conclude," far from being improper argument, are actually "factual inferences from undisputed basic facts." *Commissioner v. Duberstein*, 363 U.S. 278, 291. Thus they are unassailable here. *United States v. National Association of Real Estate Boards*, 339 U.S. 485, 495-496; *Socash v. Addison Crane Co.*, 120 U.S. App. D.C. 308, 346 F. 2d 420.

11. Finding 72 (JA 2663) recites that, apart from the Denetsone-De Rose charges that were adopted by the Advisory Committee in June 1963, there was nothing concerning Amendment No. 11 and the classification of *Healing v. Jones* as a claims case that was before or available to the Secretary and his Solicitor in October and November 1963 that was not equally available to and otherwise before

Assistant Secretary Carver and the Solicitor in July 1962 when the latter two joined in approving Amendment No. 11.

The Secretary asserts (Sec. Br. 57) that the finding "is not supported by evidence and is irrelevant argument."

Here again, since the Secretary fails to point to a single document by way of contradiction—and we have already (*supra*, p. 13) exposed the groundlessness of his present assertion that the 1957 Advisory Committee minutes were never discovered before November 1963—his attack on the sufficiency of the finding necessarily fails. It might be noted that Barry while testifying substantially if reluctantly admitted the gist of what is now objected to (JA 1732-1734).

Finding 72 is completely factual, and hence plainly not subject to the stricture of being "argument." And since the basic area of controversy turns in large measure on the parties' relative good faith or lack of it, Finding 72 can hardly be deemed "irrelevant."

12. Finding 75 (JA 2664) points out that counsel for the other side in *Healing v. Jones*, who also had claims and general counsel contracts, advised his client that *Healing v. Jones* was a claims case.

The Secretary's objection (Sec. Br. 57), that Fdg. 75, "concerning a different attorney's contract with a different tribe, is completely irrelevant here," significantly fails to disclose three vital facts of record.

First, the "different attorney's contract with a different tribe" dealt with precisely the same litigation. Surely the present appellee cannot in all conscience be charged with improper conduct for calling *Healing v. Jones* a claims case for the Navajos when his opponent in the identical lawsuit called it a claims case for the Hopis.

Second, far from deeming this matter irrelevant, the Secretary offered in evidence by way of rebuttal a letter

from this same "different attorney"—which had been written during the trial of the present action (Def. Ex. 35 for id., JA 2012-2013).

Third, when that letter was excluded as obvious hearsay, and the district judge offered to hold the case open so that the Secretary might produce the "different lawyer" as a witness, when he would of course be subject to cross-examination, the offer was not accepted (JA 1887)—but the "different lawyer's" letter is included by the Secretary in this record (JA 2012-2013)!

13. Once more it is necessary to quote a finding; Fdg. 76 (JA 2664) reads:

"76. DeRose and Genevieve Denetsone charged at the trial that plaintiff was always fighting everyone, naming industry, labor, the banks, and the States of the Union. Analysis of the matters handled by the plaintiff on behalf of the Navajo Tribe shows that, in furtherance of the Tribe's interests, he either litigated or negotiated on its behalf, with or against power companies, oil and gas companies, local banks, labor unions, and, in matters involving jurisdiction over Navajo Indians, State courts and agencies."

The Secretary objects (Sec. Br. 57) because "not fact and * * * argumentative."

The contrary is easily demonstrated. The charge of fighting was made by two of the Secretary's witnesses (De Rose, JA 1289-1290, 1304-1305; G. Denetsone, JA 1250-1251).

Since the Secretary had opened the door, plainly the General Counsel was free to offer evidence to explain and rebut the allegations made, as follows: Disputes with power companies on behalf of the Navajo Tribe (JA 1366-1368, 1465-1467); negotiations with oil and gas companies on behalf of the Navajo Tribe (JA 148-149); disputes with local banks on behalf of the Navajo Tribe (JA 1463-1465); disputes with labor unions on behalf of the Navajo Tribe

(JA 1471-1473; *Navajo Tribe v. Labor Board*, 109 U.S. App. D.C. 378, 288 F. 2d 162, certiorari denied, 366 U.S. 928); jurisdictional disputes with States on behalf of the Navajo Tribe (JA 1467-1471; *Williams v. Lee*, 358 U.S. 217; *New Mexico v. Begay*, 357 U.S. 918, denying certiorari to review *Begay v. State*, 63 N.M. 409, 320 P. 2d 1017).

Consequently Fdg. 76 is not only "fact", it does not become invidiously "argumentative" because it disproves in detail the generalized accusations made by the Secretary's witnesses.

14. Finding 78 (JA 2664-2665) is also assailed (Sec. Br. 57) as "not fact and * * * argumentative"; this likewise needs to be quoted in full, together with the finding immediately preceding it.

"77. At the trial, the defendant Secretary asserted that the plaintiff was 'adroit' in getting matters through the Department of the Interior, and charged that he 'sneaked papers through the Department.'

"78. In view of the numerous documents considered over a long period of time in connection with (a) the increase in plaintiff's retainer effected by Amendment No. 9, (b) the authorization to employ McPherson and Wolf on claims cases, (c) the classification of *Healing v. Jones* by the Department of the Interior as a claims case, and (d) the approval of Amendment No. 11, the number of persons who reviewed and approved each matter prior to approval, and the complete absence of any evidence in the record that plaintiff acted other than with complete propriety in obtaining Departmental approval in these four matters, the defendant Secretary's charges, made on the witness stand, that the plaintiff was 'adroit' or 'sneaky,' are groundless in point of fact."

Here are the references supporting Finding 78:

Assertion by Secretary that the General Counsel was "adroit" (JA 1647, 1650, 1673, 1682-1683); same that he "chose to sneak around" (JA 1651)—and although the

Secretary later denied using the word "sneaking" he nonetheless refused to withdraw it (JA 1683).

Clause (a), approval of Amendment No. 9, rests on Fdgs. 49-52 (JA 2656-2657), none now objected to. Four months elapsed between execution of the amendment and its approval (JA 90-95); among the documents considered were Pl. Ex. AP and AQ (JA 2342-2353); the names of the Secretarial subordinates approving action before it reached the Secretary are on Pl. Ex. BI (Supp. JA).

Clause (b), authorization to employ McPherson and Wolf on claims cases, rests on Fdg. 52 (JA 2657), to which no objection is made. Such authorization was requested in November 1959 (JA 294-298), presented to the Council in January 1960 (JA 299-302) and adopted then (Pl. Ex. E, JA 2030-2031), and finally approved within the Department in July 1960 (JA 139-141); total elapsed time, eight months. The memorandum at JA 140-141 does not disclose precisely how many persons in the Department dealt with the matter, but refers to a further memorandum from the Commissioner that is not in the record.

Clause (c), dealing with the original classification of *Healing v. Jones* as a claims case, rests on Fdgs. 63-65 (JA 2660-2661), none questioned by the Secretary. The elapsed time from original Departmental inquiry to final Departmental action was five months. Five documents—four letters and some voluminous minutes—are involved, Pl. Ex. F-I and K (JA 2032-2134), all of which were incorporated by reference into findings that the Secretary now accepts.

Clause (d), approval of Amendment No. 11, rests on Fdg. 66A (JA 2661-2662), to which no objection is interposed. Elapsed time, five months, as follows: Council resolution, February 1962; date of Amendment, April 1962; approval by Secretary, July 1962. Four documents involved: (1) resolution (JA 108-110); (2) Amendment No. 11 (JA 100-106); (3) letter from General Counsel furnishing informa-

tion to Solicitor Barry (Pl. Ex. L, JA 2134-2135); (4) Surname copy showing approval by Barry and others (Pl. Ex. BJ, Supp. JA); Secretary approval (JA 107-108), original paper of which (4) was a copy.

Not only, therefore, is Fdg. 78 plainly supported by the record, but, once again, detailed factual disproof of accusations made by the Secretary while testifying under oath cannot fairly be objected to as "argumentative."

15. Finding 80 (JA 2665) had better be quoted:

"80. During the seventeen and a half years that the plaintiff, Norman M. Littell, has acted as the General Counsel and Claims Attorney of the Navajo Tribe of Indians, he has at all times represented his client competently, faithfully, loyally and honestly."

This is attacked (Sec. Br. 57) as an erroneous conclusion "in view of the now known facts."

To the contrary, it is supported by the testimony of witnesses (JA 1844-1845, 1874). The district judge preferred to believe them over the Secretary, whose continual denunciations of the General Counsel from the witness stand stud the present record: "unethical" (JA 1635, 1643, 1661, 1663, 1666, 1677); "misconduct" (JA 1626, 1627, 1643); "gross misconduct" (JA 1647, 1666); "dishonest" (JA 1666, 1702); "adroit" (JA 1647, 1650, 1673, 1682-1683); "unconscionable" (JA 1627, 1634, 1644, 1677, 1702); "sneaking" (JA 1651, 1683); "lack of integrity" (JA 1702); "outrageous" (JA 1683); "deception" (JA 1652); and "tricky language" (JA 1666).

If the command in Rule 52(a) that "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses" means anything, it means that Fdg. 80, just quoted, is unassailable.

16. Finding 81 (JA 2665-2666), which was not mentioned in the Statement of Points (Sec. Br. 15), is now singled

out for attack as a conclusion asserted (Sec. Br. 57) to be "erroneous in view of the now known facts"; it reads:

"81. The conclusions reached by the Court at the close of the contempt hearing, that the plaintiff is 'a man of outstanding integrity and character,' and that he is 'an outstanding lawyer,' have not been altered by any of the testimony adduced against him at the trial, but have on the contrary been in every respect confirmed."

The quotations are from JA 2633. Of course this finding, which represents a conclusion of ultimate fact, is not for that reason objectionable. See generally *Commissioner v. Duberstein*, 363 U.S. 278, 289-292.

All that needs to be added is that in the Secretary's view "the now known facts" are the allegations of Solicitor Barry's command-performance November Memoranda (JA 220-240): this view conveniently (but quite improperly) ignores all the evidence adduced after a trial lasting two weeks, evidence that is accurately summarized in all of the other findings, evidence that is not mentioned in the Secretary's brief.

17. Findings 82 to 107, inclusive (JA 2666-2671), relate to Zimmerman's asportation of documents at the Navajo reservation, whence he had been sent "to obtain additional evidence to fortify the conclusions that [the defendant Secretary and Solicitor Barry] had already reached" (Fdg. 82, JA 2666); to the General Counsel's repeated ejection from meetings of the Navajo Tribal Council by Chairman Nakai with the evident approbation of the Secretary's subordinates, conduct that resulted in the contempt hearing; and to the Secretary's contribution to the "almost total destruction of the Navajo Tribe's Legal Department * * * as a result of the defendant Secretary's announced 'policy to get him out'" (Fdg. 107, JA 2671).

All of those 27 findings are assailed as "irrelevant" (Sec. Br. 15, 57).

The Secretary misses the point. These findings, as we show below under Point IV, pp. 67-74, are vitally relevant to the relief to which the plaintiff has become entitled in the permanent injunction by reason of the Secretary's behavior during the pendency of the preliminary injunction.

18. Finding 92 (JA 2668) recites the General Counsel's first ejection from the meeting of the Navajo Tribal Council; the fact that Zimmerman and the Bureau representatives sat by silently; and concludes that "The members of the Tribal Council regarded this silence as tantamount to approval, inasmuch as in the past Bureau representatives had always injected themselves into the discussions whenever they considered that an irregularity was taking place."

The quoted passage is challenged (Sec. Br. 57) as "conclusion, not fact, and is unsupported by substantial evidence."

The record contains ample supporting evidence (JA 733, 857-858, 872-875, 689-694). For the rest, we submit it is too late in the day to argue that the state of a person's mind is not to be regarded as a fact.

19. The next finding challenged must first be placed in its setting. It deals with the Department's failure ever to approve Amendment No. 13 to the General Counsel's contract, providing salary increases for five assistants, which was authorized in May 1963, executed in June, and forwarded to the Department with a favorable recommendation from the Area Director in August (Fdg. 101, JA 2670). In December 1963, Chairman Nakai urged approval, and in March 1964 the Area Director again recommended approval, except for par. 4, which read, "The Attorney Contract, as amended, between the Tribe and the Attorneys shall remain in full force and effect except as amended herein" (Fdg. 102, JA 2670). Finding 103 (JA 2671) now becomes intelligible; it is in these terms:

"103. In view of the circumstances that Amendment No. 13 had been executed long before there was any con-

troversty over the Secretary's power to terminate the plaintiff's basic contract, that its paragraph 4 contained language that in substance had been included in each of the twelve prior amendments, and that its approval with a specific reservation as to that paragraph had been recommended by the Area Director, the Secretary's complaint on the stand that it contained 'tricky language' is without foundation."

The Secretary objects (Sec. Br. 57) on the ground that it "is a conclusion, not fact, and is erroneous."

Actually—we are almost tempted to add, "of course"—the finding is fully supported by evidence, as follows: Amendment No. 13, Pl. Ex. Y (JA 2234-2240); recommendation for approval, Pl. Ex. AZ (JA 2360); Nakai's letter, Pl. Ex. AV (JA 2356); second but qualified approval by area director, Pl. Ex. AW (JA 2357-2358); similar language in other amendments, JA 53, ¶6 (No. 1); JA 56, ¶4 (No. 2); JA 60, ¶3 (No. 3); JA 65, ¶5 (No. 4); JA 71, ¶7 (No. 5); JA 76, ¶4 (No. 6); JA 82, ¶6 (No. 7); JA 87, ¶2 (No. 8); JA 92-93, ¶8 (No. 9); JA 98, ¶5 (No. 10); JA 105, ¶7 (No. 11); Pl. Ex. O, ¶8 (No. 12), JA 2142; Secretary's characterization (JA 1666).

20. The next finding under attack had better be quoted; Fdg. 107 (JA 2671) reads:

"107. The Secretary has contributed to the almost total destruction of the Navajo Tribe's Legal Department and the isolation and circumvention of the plaintiff as its general counsel as a result of the defendant Secretary's announced 'policy to get him out.'"

This is asserted (Sec. Br. 57) to be "a conclusion, totally unsupported by any evidence."

Examination of the record shows that Finding 107, while indeed a conclusory finding, rests on—and is fully supported by—Findings 101-106, inclusive (JA 2670-2671), which set forth what happened to the Navajo Tribe's Legal Department, and by Findings 45 and 46 (JA 2655), which

recite the Secretary's policy to get rid of the General Counsel.

Of the supporting findings, only Fdg. 103 is now asserted to be wrong, and that one has solid factual foundation, as we have just demonstrated under the numbered item just preceding.

21. Finding 113 (JA 2673-2674) must also be quoted; it says:

"113. It was shown at the hearing before Judge McGarraghy on the defendant Secretary's motion to clarify that, on December 22, 1953, the Bureau of Indian Affairs had promulgated instructions governing Accounting Procedures, which provided in Section 606.11 C(4)(a) that 'Payments of attorneys' fees or compensation do not require tribal approval.' "

This is objected to (Sec. Br. 57) as "erroneous, because the regulations cited do not apply to the Navajo Tribe."

The Secretary's assertion is wholly unsupported; the regulation in terms applies to all Indian tribes (Pl. Ex. BR, JA 2540-2553). Moreover, the regulation is consistent with the corresponding provision of the Interior Appropriation Act, 1965, P.L. 88-356, 78 Stat. 273, 275 (Tribal Funds), in force during the trial, and with the same provision of the Interior Appropriation Act, 1966, P.L. 89-52, 79 Stat. 174, 176 (Tribal Funds) ("compensation and expenses of attorneys and other persons employed by Indian tribes under approved contracts").

22, 23. Findings 115 and 116 (JA 2674), the next to evoke dissent from the Secretary, similarly require quotation:

"115. Letters and memoranda emanating from members of the Department of the Interior reflect a persistent purpose to obstruct, at least to the extent that the terms of the preliminary injunction permitted, the payment of the plaintiff's retainer and expense vouchers.

“116. The Court finds that, unless the defendant Secretary and his subordinates are appropriately restrained and enjoined by injunction, they will probably continue to interpose obstacles and delays, either directly or indirectly, to the prompt payment of plaintiff's expense and retainer vouchers.”

The objection (Sec. Br. 57) is that these “are vague conclusions as to motives of unnamed government employees and are without support of substantial evidence.”

Here again, the Secretary's objections are wishful rather than factual.

First, these findings rest on the facts already set forth in Fdgs. 107A to 114, inclusive, only one of which is objected to, and there the objection rests on palpable misreadings of regulations and statutes; see discussion under Fdg. 113, immediately above.

Second, “the persistent purpose,” which is reflected generally in the foregoing findings, becomes more particularly apparent from the following exhibits: Pl. Co. Ex. 19 (JA 2573-2578); Pl. Ex. BC (JA 2368-2380); memo. supporting motion to “clarify” (JA 1067-1071).

Third, “the persistent purpose” reflects the Secretary's own policy to get rid of the General Counsel, which appears, without objection by the Secretary, in Fdgs. 45 and 46 (JA 2655).

24. Finally, Finding 118 (JA 2674-2675) deserves full quotation, even at the cost of lengthening the present brief:

“118. Mrs. Annie Wauneka, a distinguished Indian leader whose dedication to the welfare of the Tribe has been recognized by the President of the United States by his awarding to her the Medal of Freedom, is a member of the Tribal Council. The wisdom, honesty, sincerity and judgment manifested by her while she was testifying in the contempt proceeding and also in this action and also that of Mr. McCabe, the Director of Administration for the Tribe, has greatly impressed

the Court. The Court chooses to give more weight to their testimony than it does to that of the Secretary, Barry, DeRose, and the Denetsones, and particularly with reference to their testimony regarding the ability of the Tribal Council to conduct its own affairs and make its own decisions.

"Mr. McCabe, who has attended practically every Tribal Council meeting since July, 1951, expressed confidence in the ability of the Council members to handle their own affairs. He testified that a few of the matters the Council has considered and resolved included the development of mining regulations, grazing regulations, and trading post regulations, and the preparation of an annual Tribal budget.

"Mrs. Wauneka has been a Council member since 1951 and the Court has already commented upon her credibility as a witness. She testified that the Council members are 'able and capable of handling the Tribal affairs to my way of thinking.'

"The Court finds from the evidence that the Tribal Council has the ability, knowledge, and intelligence to handle its own affairs."

The Secretary, predictably, does not like this finding; he objects twice, once (Sec. Br. 56) because it is "either erroneous, misleading, or irrelevant in whole or in part because * * * based on the mistaken notion that the supreme authority is the Navajo Tribal Council," and then again (Sec. Br. 57) because it "concerns a matter which was not proper for finding by the court and is clearly erroneous as applied to the Tribal Council."

What is basic at this juncture is the fact that the issue of the competency of the Tribal Council to handle its own affairs was injected into the trial by the Secretary (JA 1081, 1085-1086, 1401-1402), and that the Secretary himself testified that he undertook to terminate the contract on his own in preference to leaving the matter to the Council because it was his responsibility as trustee (JA 1657, 1661-1664, 1687), and because (JA 1690) "It is just as though

we had a child or an incompetent, and I can't let an attorney representing them say the incompetent has approved it and therefore you rubber-stamp it."

Thereafter, the court heard testimony from other witnesses, to the effect that the Navajo Tribal Council was eminently competent to deal with the matters coming before it (JA 1832-1840, 1849-1850, 1866-1869), and chose to believe them in preference to the Secretary—whom the court had already disbelieved in other respects (e. g., Fdg. 35, JA 2652; Fdg. 52, JA 2657; Fdgs. 77-78, JA 2664-2665; Fdg. 103, JA 2671; JA 2622). Thus Finding 118 rests entirely on credibility; it is accordingly unassailable.

Moreover, since the Secretary in his own testimony characterized the Indians as "incompetent," their competency does not become (Sec. Br. 57) "a matter * * * not proper for finding by the court." Here, as throughout the trial, the Secretary's position is that any and all evidence disproving his own allegations becomes automatically irrelevant.²⁰

We regret that the foregoing review of the Secretary's attack on no less than 50 findings of fact has consumed so much space. But we think our course justified by our having thereby been enabled to demonstrate to the Court the utter lack of substance in the Secretary's objections.

²⁰ The remaining objection to this finding, that (Sec. Br. 58) "Obviously the measure of what would be a 'claims' case under the contract would be far beyond Navajo concepts," founders on the circumstance that what was a claims case under this particular contract was shown by the Secretary's testimony to be well beyond his own concepts: He admitted being unfamiliar with this contract's claims provision (JA 1690, 1699), and defined a claims case as only a matter pending before the United States Court of Claims or the Indian Claims Commission (JA 1688-1689).

IV. THE CONDUCT OF THE SECRETARY AND OF HIS SUBORDINATES DURING THE PENDENCY OF THE PRELIMINARY INJUNCTION AMPLY WARRANTED AND INDEED REQUIRED THE BROADER AND MORE DETAILED RESTRAINTS INCLUDED IN THE PERMANENT INJUNCTION.

A. It is well settled that a defendant's misconduct justifies more particularized injunctive relief against him.

Not only is it an established rule that equity speaks as of the date of the decree (e.g., *McComb v. La Casa del Transporte*, 167 F. 2d 209, 212 (C.A. 1); *Fleming v. Knudson & Mercer Lumber Co.*, 159 F. 2d 212, 214 (C.A. 7); *Tilbrook v. Forrestal*, 65 F. Supp. 1, 4 (D. D.C.; 3-judge court with 2 C.A. members)), but it is well settled that a final decree may properly "restrain acts which are of the same type or class as the unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past" (*Labor Board v. Express Pub. Co.*, 312 U.S. 426, 435), and that it "should be broad enough to prevent evasion" (*Local 167 v. United States*, 291 U.S. 293, 299).²¹

It is in the light of this unquestioned equitable doctrine that we must now consider the course of conduct on the part of the Secretary and his subordinates, conduct effectuating the Secretary's intention to get rid of the General Counsel (Edgs. 45-46, JA 2655), and that hence "may fairly be anticipated from the defendant's conduct in the past" (*Labor Board v. Express Pub. Co.*, 312 U.S. at 435)—but which the specific provisions of the final decree are designed to prevent for the future.

²¹ Other phrasings of the basic principle in varying situations will be found in *May Department Stores v. Labor Board*, 326 U.S. 376, 390-391; *Ambassador, Inc. v. United States*, 325 U.S. 317, 325; *Warner & Co. v. Lilly & Co.*, 265 U.S. 526, 532; *Elm Corporation v. E.M. Rosenthal Jewelry Co.*, 82 U.S. App. D.C. 196, 203, 161 F. 2d 902, 909; *Beneficial Finance Co. v. Wirtz*, 346 F. 2d 340, 344 (C.A. 7); *Walling v. Panther Creek Mines*, 148 F. 2d 604, 605 (C.A. 7).

B. The permanent injunction is designed to meet every means by which the Secretary was shown, even after the entry of the preliminary injunction, to have carried out his predetermined purpose to get rid of the General Counsel, and it accomplishes that result without in any respect exceeding the scope of hitherto approved injunctions against public officers.

As has already been noted, the permanent injunction reflects primarily the restraints of the earlier preliminary injunction that this Court has already affirmed.

1. Enjoining termination of the contract

Par. 1 of the preliminary injunction (JA 349) enjoined termination or cancellation of the contract, and the same provisions appear in identical language as par. II(1) of the permanent injunction (JA 2685).

Pars. I(1) and I(2) of the permanent injunction, responsive to the prayer of the complaint for a declaratory judgment (JA 8, ¶2), declare that the Secretary had no legal power to cancel the General Counsel's contract and that the act of purported cancellation, quoting it, was in excess of the Secretary's powers.

We do not understand that the Secretary objects to the scope or terms of these provisions (as distinguished from their substance).

2. Enjoining improper interference with performance of the contract

Par. 2 of the preliminary injunction (JA 349) enjoined the Secretary and his subordinates from "Suspending or otherwise improperly interfering with the performance by the plaintiff under and pursuant to said approved contract," and, here again, the same provisions appear in identical language as par. II(2) of the permanent injunction (JA 2685).

Much of the controversy between the parties turned on the scope of "otherwise improperly interfering with the performance" of the contract. The record shows that,

during the pendency of the preliminary injunction, the Secretary's subordinates collaborated in the preparation of a document declaring that the plaintiff's "usefulness as General Counsel to the Navajo Tribe is at an end" (Fdg. 85, at JA 2667), and then collaborated with the Chairman in effecting the General Counsel's ejection from successive meetings of the Navajo Tribal Council, in such a manner as to indicate Departmental approval of these ejections (Fdgs. 85-98, JA 2666-2669). Following the first ejection, the Secretary's emissary, Zimmerman, said to a Council member, "Now you see that the Secretary of the Interior cannot be pushed around" (Fdg. 93, JA 2668).²²

In consequence of both ejections, the Secretary, Zimmerman, and Barry were the subjects of a motion to cite for contempt (JA 367-369, 1024-1027), a motion that was denied because of insufficient evidence (Fdgs. 99-100, JA 2669-2670; JA 2629-2642b; JA 2396-2397). At that time, the district court was unaware that the acts complained of had occurred while it was the official policy of the Department of the Interior to get the General Counsel out, a policy the Secretary testified to only at the trial on the merits (Fdg. 100A, JA 2670).²³

Even so, the district court, construing par. 3 of the General Counsel's contract (JA 38), ruled that the General Counsel had a right to be present at meetings of the Tribal

²² Zimmerman, a lawyer (JA 453), denied making this statement (JA 417, 451), whereupon the district court subsequently said (JA 1019, 1020), "I do not believe Mr. Zimmerman. * * * I don't think Mr. Zimmerman has been frank. I don't think he has told this Court the truth * * *."

²³ It was obviously this circumstance that induced the statement in the district court's opinion (JA 2614), "that if all of the evidence that was introduced by both parties in the present action had been available for the Court's consideration at the contempt proceeding, the conclusion reached by the Court in that case undoubtedly would have been different."

Council, and to make reports whenever in his judgment the Tribe's best interests so required (JA 2634, 2396-2397).

Furthermore, by reason of the failure of the Secretary or his subordinates either to approve or disapprove Amendment No. 13, which would have increased the salaries of five attorneys, every one of those five has resigned, and the Navajo Tribe's Legal Department "has been virtually destroyed" (Fdgs. 101-106, JA 2670-2671). In addition, the Department of the Interior has ceased communicating with the General Counsel and no longer consults him on matters that had earlier been routinely referred to him (Fdg. 106, JA 2671). The district court found as a fact (Fdg. 107, JA 2671) that "The Secretary has contributed to the almost total destruction of the Navajo Tribe's Legal Department and the isolation and circumvention of the plaintiff as its general counsel as a result of the defendant Secretary's announced 'policy to get him out.'"

It is the foregoing course of conduct, a series of acts implementing and effectuating the Secretary's policy and intention of eliminating the General Counsel (Fdgs. 45-46, JA 2655), which underlies the provisions in the permanent injunction that particularized the simple "otherwise improperly interfering" paragraph of the earlier decree.

Pars. I(3) and II(5), see JA 2684-2686, spell out the Secretary's duty to forbear from conniving at further ejections pursuant to his untenable reading of par. 3 of the contract. And Pars. III(1) and III(2) are couched in affirmative terms to force the Secretary to recognize and treat with the General Counsel as such, and to prevent further covert interference with his performance of the contract by isolating him, as indeed was done during the pendency of the preliminary injunction.

Both of the latter paragraphs simply spell out, in affirmative form, the prohibition against unlawful interference with a contractual relationship—the gravamen of the complaint. Par. III(1) is necessary in view of the "get

him out" policy, par. III(2) is required primarily in the interests of the Tribe. The Navajos should not be deprived of their right to counsel simply because the officer charged with the supervision of Indian affairs has, unlawfully and without adequate cause, determined to get rid of the lawyer they themselves had selected—and have chosen to keep.

3. Enjoining improper interference with ordinary course of payment of vouchers

Par. 3 of the preliminary injunction (JA 350) enjoined the Secretary from "Stopping or preventing the ordinary course of payment to him pursuant to R.S. §2104 (25 U.S.C. §82) of the agreed retainer fee due under said approved contract * * *."

Significantly enough, the Secretary did not question this paragraph on his prior appeal. But, as the district court's findings demonstrate in detail (Fdg. 107A-116, JA 2672-2674), the Secretary and the Chairman, together with assorted underlings of both, participated in a course of concerted inaction, in consequence of which the General Counsel's retainer vouchers, which had been paid before the present controversy after an average of 17 days elapsed time following submission, were not paid afterwards until 9 and 10 months in some instances (*ibid.*), and this although "None of the plaintiff's retainer vouchers were ever returned to him for corrections or additional data" (Fdg. 110, JA 2673).

The level on which this later course of dealing proceeded is shown from the circumstance (Fdg. 110, JA 2673) that, "When plaintiff's counsel then made further inquiry of counsel for the defendant Secretary regarding those vouchers, the Secretary responded by filing a motion for clarification of the injunction"—and this after writing (Pl. Clar. Ex. 9, JA 1052 at 1053), "We * * * will get in touch with you next week." The entire course of conduct is painfully reminiscent of the shell game: "Voucher, voucher, where

is the voucher?" For here the General Counsel, like the countryman at the carnival, invariably lost.

It was to prevent any repetition of similar transparent devices that II(4) of the final decree (JA 2685) adds expense vouchers to those that may not be held up without cause, and that par. III(3), see JA 2686-2687, makes it the duty of the Secretary, in case the General Counsel's vouchers are not acted on by the tribal officers for 30 days, to process these vouchers himself.

The Secretary's objections (Sec. Br. 29, 31), as we read them, go particularly to par. III(3), on the footing that they direct him to violate the contract and to ignore the Tribe's payroll practices.

These objections ignore the circumstances that "payroll practices" have not been shown to require the Chairman to approve all vouchers; obviously, he cannot be supposed personally to sign every voucher justifying the periodic salary checks of all the clerks, stenographers and other employees of the Tribe.

More importantly, the Secretary's objections ignore the circumstance that the Secretary himself undertook to review the General Counsel's vouchers on his own, and to process them for payment. He took this action shortly after entry of the preliminary injunction; see the Secretary's memorandum of Dec. 16, 1963, to the Commissioner (Pl. Co. Ex. 20, JA at 2580-2581), which reflects no reliance whatever either on "payroll practices" or on the Chairman's prior approval—and which received the approval of the Department of Justice (Pl. Co. Ex. 21, JA 2581).

As a matter of both law and regulation—see Fdg. 113 (JA 2673-2674) for the regulation and see annual appropriation acts cited *supra*, p. 63, for the law—the Secretary plainly had power on his own to direct payments to the General Counsel under the latter's contract, and, as the

documents just cited indicate, the Secretary not only knew he had such power, he exercised it.

Consequently, the district court properly refused (JA 2619) to accept the Secretary's interpretation of R.S. § 2104 (25 U.S.C. § 82), that "the Secretary by withholding approval of vouchers, can accomplish his desire to 'get rid of Littell'." To the contrary, said the district court (JA 2619, 2620), "Such practice will not be condoned by this Court. * * * Such arbitrary abuse of administrative power, as has been exhibited here in the handling of vouchers, must be prevented." And the injunction accordingly complies with the Supreme Court's admonition (*Local 167 v. United States*, 291 U.S. 293, 299) that "It should be broad enough to prevent evasion."

4. Injunction complies with hitherto formulated limitations

There is nothing in any portion of the final decree dealing with the payment and processing of vouchers—pars. II(3), II(4), or III(3); JA 2685-2687—that in any way improperly directs the payment of funds of the United States; indeed, the Secretary is specifically told he shall review for sufficiency of form and substance. But he may not arbitrarily prevent the ordinary course of payment, as he so plainly did during the period between the entry of the two injunctions.

The voucher provisions of the permanent injunction not only do not violate any law or principle of equity, they were drawn in the light of similar provisions that had earlier obtained the approval of the Supreme Court. *Miguel v. McCarl*, 291 U.S. 442, 456; *Wilbur v. United States*, 280 U.S. 306, 319; *Payne v. Central Pac. R. Co.*, 255 U.S. 228, 238; *Payne v. New Mexico*, 255 U.S. 367, 373.

In all of the instances cited, the officer concerned was directed to process a particular application, for money or land as the case might be, on the merits, in conformity with

the court's opinion, and unaffected by the officer's earlier views that the litigation had shown to be contrary to law.

This is precisely what the decree does here, neither more nor less.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the final judgment entered by the district court herein should be affirmed in all respects.

FREDERICK BERNAYS WIENER,
1750 Pennsylvania Avenue, N.W.,
Washington, D. C. 20006,

JOHN F. DOYLE,
206 Southern Building,
Washington, D. C. 20005,

Attorneys for the Appellee.

MARCH 1966.

APPENDIX**STATUTES, RULE OF COURT, &c.. INVOLVED****A. Statutes**

1. R.S. §2103, as amended, 25 U.S.C. §81, is set forth at Sec. Br. 59-60.
2. R.S. §2104, 25 U.S.C. §82, is set forth at Sec. Br. 60-61.

B. Rule of Court

3. Rule 52(a), F.R. Civ. P., provides in pertinent part:

"Rule 52. Findings by the Court**"(a) Effect.**

" * * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * * "

C. Navajo Tribal Code Provisions

4. 2 N.T.C. §101 is set forth at JA 159.
5. 2 N.T.C. §281 is set forth at JA 159.
6. 2 N.T.C. §284 is set forth at JA 2029.
7. 2 N.T.C. §1173(c) is set forth at JA 163.

D. Indian Affairs Regulation

8. The provisions of the 1953 amendments of the Indian Affairs Manual governing payments to Tribal attorneys are set forth at JA 2540-2553. Sec. 606.11 C(4)(a), which is quoted in part in Fdg. 113 (JA 2673-2674), appears at JA 2543.

REPLY BRIEF FOR STEWART L. UDALL,
SECRETARY OF THE INTERIOR, APPELLANT

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,725

STEWART L. UDALL, SECRETARY OF THE INTERIOR,
APPELLANT

v.

NORMAN M. LITTELL, APPELLEE

Appeal from the United States District Court for the
District of Columbia

United States

for the District of Columbia Circuit EDWIN L. WEISL, JR.,
Assistant Attorney General.

FILED APR 8 1966

ROGER P. MARQUIS,
HERBERT PITTLE,
THOS. L. McKEVITT,

Nathan J. Paulson

Attorneys, Department of Justice,
Washington, D. C., 20530



INDEX

	Page
Introduction	1
Part A:	
Plaintiff gives no substantial response to appellant's basis for reversal of the judgment.....	2
I. The judgment is erroneous because of misunderstanding of the relative positions of the Secretary of the Interior, the Navajo Tribe and the federal court.....	2
A. The judgment assumes a power of the federal court to compel the Secretary of the Interior to accept as conclusive action of the Tribal Council and to order affirmative action the court thinks desirable as to internal affairs of the Tribe.....	2
B. The Secretary of the Interior is the superior, not the subordinate, of the Tribal Council	2
C. Federal courts are not authorized to interfere with or adjudicate controversies as to the internal affairs of Indian tribes	3
D. The judgment unwarrantedly seeks to control the discretionary authority of the Secretary of the Interior	3
II. The district court lacked jurisdiction affirmatively to coerce by injunction personal services of an attorney...	4
III. The Secretary was empowered to withdraw his approval of plaintiff's contract and then terminate his future services	5
IV. Regardless of limits on the court's power, plaintiff is not entitled to invoke the equitable relief granted by the judgment	7
A. The district court abused its discretion in coercing, in every way possible, the Chairman of the Tribe to accept plaintiff as his attorney for all official purposes	7
B. Plaintiff's actions concerning the three matters given as cause for terminating his contract disqualify him from securing equitable relief	7
1. The history of the contract and performance under it	7
2. Use of general counsel attorneys on claims cases	7

II

Argument—Continued	Page
3. Unauthorized increase in plaintiff's compensation	9
4. The <i>Healing v. Jones</i> matter	10
5. The departmental approval of the amendments to the contract does not immunize the plaintiff from responsibility for his breaches of trust.....	11
V. Many findings of fact are erroneous because of mistakes of law or lack of support in the evidence	11
Part B:	
Plaintiff's additional arguments do not justify affirmance of the decree	13
I. The motives of the Secretary or the Solicitor cannot excuse plaintiff's conduct	13
II. The charges of bad faith against the Secretary are groundless	14
III. The charges of "deceitful" conduct by the Solicitor are groundless	15
Conclusion	17

CITATIONS

Cases:	
<i>Beaver v. United States</i> , 350 F.2d 4.....	11
<i>Healing v. Jones</i> , 210 F.Supp. 125.....	10
Miscellaneous:	
2 Cong. Rec., 43d Cong., 1st sess.	5
S. Rept. No. 8, 83d Cong., 1st sess.	6
Prosser, <i>Torts</i> (3rd ed. 1964)	3, 4

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,725

**STEWART L. UDALL, SECRETARY OF THE INTERIOR,
APPELLANT**

v.

NORMAN M. LITTELL, APPELLEE

**Appeal from the United States District Court for the
District of Columbia**

**REPLY BRIEF FOR STEWART L. UDALL,
SECRETARY OF THE INTERIOR, APPELLANT**

INTRODUCTION

Throughout plaintiff's brief are discussions of many matters which we believe are irrelevant to the issues now before this Court. Examples are the many charges leveled against the Secretary, the Solicitor of the Department of the Interior and others. We will answer such matters in Part B of this brief. We will first show in Part A that no substantial answer is given to the grounds upon which we urge that the decree must be reversed. Analysis will be aided by considering the response given to the points made in our opening brief.

PART A

PLAINTIFF GIVES NO SUBSTANTIAL RESPONSE
TO APPELLANT'S BASIS FOR REVERSAL OF THE
JUDGMENT

I

The Judgment Is Erroneous Because Of Misunderstanding Of The Relative Positions Of The Secretary Of The Interior, The Navajo Tribe And The Federal Court

A. *The judgment assumes a power of the federal court to compel the Secretary of the Interior to accept as conclusive action of the Tribal Council and to order affirmative action the court thinks desirable as to internal affairs of the Tribe.*—Plaintiff does not deny this.

B. *The Secretary of the Interior is the superior, not the subordinate, of the Tribal Council.*—Plaintiff replies that the injunction renders the Tribal Council superior to the Secretary "only in respect of this contract" (Br. 31). But that is all that is concerned in this case. There is nothing to indicate that, by approving the contract, the Secretary waived powers and duties he would otherwise have or that he thereby did (or could) relinquish to the Tribal Council his duty to supervise all the Tribe's affairs. Plaintiff, like the district court, continuously emphasizes the claim that the majority of the Tribal Council favors him and that only it can terminate his contract (e.g., Br. 31, 32, 33). He says "the client is quite content with its attorney" (Br. 32). But as plaintiff on the same page repeats, "the client is the Navajo Tribe." Plaintiff has no response to the fact that it is the function of the federal guardianship to protect the Tribe from misguided action or nonaction by its agents, including the Tribal Council. The federal courts should, we submit, do the same, rather than make action of the majority of the Council conclusive.¹

¹ Plaintiff construes as a "threat" (Br. 21) our observation that the legal existence of the tribal government rests on Secretarial regulations. That does not answer our demonstration of the district court's misunderstanding of the Secretary's authority in the premises. How far it should be exercised is another matter.

C. *Federal courts are not authorized to interfere with or adjudicate controversies as to the internal affairs of Indian tribes.*—Plaintiff answers (Br. 34) only that the Tribe was not a necessary party to this action and, he says, therefore its internal affairs are not involved. The “therefore” is a plain non sequitur. It is hard to imagine more complete intrusion into internal affairs than court control of the conduct of meetings of the Tribal Council. Plaintiff cannot ignore in this Court the basic cause of this controversy, i.e., his disagreements with Nakai, the elected Chairman of the Tribe, or the attempt of the district court indirectly to coerce Nakai. While calling the holding of *Littell v. Nakai* “dictum” (Br. 34), plaintiff makes no attempt to prove the dictum does not state the law. The line of cases again ignored by plaintiff, of which the *Nakai* case is one, may not, we submit, be so summarily dismissed. Examination of them (Opening Br. 27-30) will show that they do not rest on sovereign immunity of the Tribe, as plaintiff would like to have it.

D. *The judgment unwarrantedly seeks to control the discretionary authority of the Secretary of the Interior.*—Plaintiff puts his whole case on the theory of *Lumley v. Gye*, enjoining interference with contractual relations (e.g., Br. 34). That was purely negative relief. Elsewhere in his brief, plaintiff recognizes that the relief against interference with performance of the contract is accomplished “by providing affirmatively that the Secretary must recognize and deal with the General Counsel as such” (Br. 16-17, 70). No authority is cited for such an enlargement of the *Lumley v. Gye* theory. Thus, plaintiff has given no answer to our point that these affirmative orders to the Secretary are seeking to control his discretionary action. The *Lumley v. Gye* theory has produced a wealth of decision with considerable conflict of view. Plaintiff’s argument, especially at Br. 33, may be answered by Prosser, *Torts* (3rd ed. 1964) sec. 123, p. 951, that: “The statement that the defendant has acted ‘illegally,’ ‘unlawfully,’ ‘wrongfully,’ or ‘tortiously’ has

been characterized, when it appears in a pleading, as mere vituperation; and it can scarcely be less so when it is pronounced as the ground of a court's decision." After discussion of many cases, Prosser states (*Id.*, p. 968):

In contrast, an impersonal or disinterested motive of a laudable character may protect the defendant in his interference. This is true particularly where he seeks to protect a third person toward whom he stands in a relation of responsibility, as in the case of a mother endeavoring to exclude a diseased person from her child's school, school authorities making regulations for the welfare of their students, an agent protecting the interests of his principle, or an employer those of his employee, provided that the steps taken are not unreasonable in view of the harm threatened. There may also be a privilege to protect the public interest, as by removing a danger to public health or morals, or making complaint of the misconduct of an employee of a public utility, or taxpayers objecting to the expenditure of public money. [Footnotes omitted.]

Thus, the need to protect the Navajo Tribe from the failure of the majority of the Council to protect the Tribe's rights is, by itself, a reason for reversal of the decree.

II

The District Court Lacked Jurisdiction Affirmatively To Coerce By Injunction Personal Services Of An Attorney

Plaintiff's only reply is that the client is the tribe (Br. 32). That does not change the fact that the court is here undertaking to supervise the conduct of personal services, especially of an attorney. Plaintiff, of course, has no decision supporting his view. We submit that the principles applicable to personal service contracts and especially attorneys' contracts outlined in our opening brief (pp. 32-36) apply with full force here. These equitable principles, and the reasons they exist, cannot be passed over because the Tribe is the technical client.

III

The Secretary Was Empowered To Withdraw His Approval Of Plaintiff's Contract And Then Terminate His Future Services

Plaintiff's answers to this point are, we submit, plainly no basis for holding that, when the Secretary discovers that an attorney for an Indian tribe has consistently been violating his contract with it (see, *infra*, pp. 7-9), the Secretary has no power to withdraw approval previously given so as to end such violations.

The argument (Br. 23) that passage of the 1872 Act proves the absence of authority to revoke approval given pursuant to the Act is pure bootstraps, since the Act is silent on the issue whether approval may be withdrawn. Moreover, there are many areas where Congress may specifically legislate where the Secretary is empowered to act in the absence of legislation. That is the basic point of the line of cases cited in our opening brief at pages 21-24. Plaintiff simply rejects those cases without mentioning them.

The 1874 Act (Br. 25-26) supports our position, not the plaintiff's. That Act, in effect, made the 1872 Act retroactive to apply to contracts existing in 1872. It dealt in detail with investigations that the Department of the Interior should make as to all contracts then existing before the contracts could be enforced. The bill was explained to the House as follows (2 Cong. Rec., 43d Cong., 1st sess., p. 1398):

Very large amounts of money have been collected from Indians on these contracts since that time; and since 1847, since the passage of the act for making contracts with the Indians, there has been a large amount of money collected. It is proposed by this bill to subject all that class of contracts to the scrutiny of the official examination of the Secretary of the Interior and the Commissioner of Indian Affairs; and it requires that they shall put an official indorsement on the paper, saying that the contract is not

exorbitant and not fraudulent, or that it is exorbitant and is fraudulent. Until that official indorsement is put upon the contract every officer and employe of the Government is forbidden to recognize the legality of those contracts or to make any payment upon them in any way whatever.

A reading of the 1874 Act to limit the power of the Secretary to take appropriate corrective action when he finds that overcharges have been made would be directly contrary to the congressional intent.

Plaintiff still invokes the analogy of a land patent in arguing that approval, once given, cannot be withdrawn (Br. 27). This ignores the much closer analogy of mineral leases where the contrary is true because of the Secretary's continuing supervision. See our opening brief, pp. 37-38.

From S. Rept. No. 8, 83d Cong., 1st sess., plaintiff (Br. 27) makes a negative inference argument, i.e., that the suggestion of one remedy (action by the Attorney General) necessarily implies that that remedy is exclusive. The Report does not show any consideration by the subcommittee of the issue here involved. Again, it supports our position in showing the congressional approval of actions taken by the Department to protect Indian tribes from attorneys.

The same negative inference argument is made as to the memorandum of the Solicitor which pointed out that plaintiff's contract gave authority to the Tribal Council, not to the Advisory Committee, to terminate it (JA 209-210). It nowhere discussed the present issue and cannot be taken as a change of position, as plaintiff asserts (Br. 33).²

² The Solicitor's October memorandum did not say (Br. 33) "only the Tribal Council could terminate the contract."

IV

Regardless Of Limits On The Court's Power, Plaintiff Is Not Entitled To Invoke The Equitable Relief Granted By The Judgment

A. *The district court abused its discretion in coercing, in every way possible, the Chairman of the Tribe to accept plaintiff as his attorney for all official purposes.—* Plaintiff's charge of bad faith against the Secretary and the Solicitor will be dealt with in detail later (*infra*, pp. 13-16). Otherwise, no answer is given to this point and the district court's intention to control indirectly the Chairman is ignored.

B. *Plaintiff's actions concerning the three matters given as cause for terminating his contract disqualify him from securing equitable relief.—*

1. *The history of the contract and performance under it.—*Plaintiff says that the 1947 contract is irrelevant and that it "was fully executed on both sides when it expired by its terms in August 1957" (Br. 29). But it was plaintiff who said the 1957 contract was substantially the same as his earlier one (JA 10)³ and he told the Advisory Committee in 1957 (JA 2088):

In fact, so that you will understand the matter, only the General Counsel part of this contract ends August 28th, 1957. Claims work goes to the end of the cases unless you terminated the contract for good cause shown so, as for claims, I need no renewal of this contract actually.

2. *Use of general counsel attorneys on claims cases.—* Plaintiff admits the fact. His three excuses lack merit.

³ In the Advisory Committee minutes upon which plaintiff so heavily relies to justify his *Healing v. Jones* position, he constantly said that there was "little minor change in the wording" and similar expressions (JA 2066 *et seq.*). In his affidavit in support of the motion for a preliminary injunction, he said the old contract "was renewed and extended in almost identical form for an additional ten years" (JA 10). The same assertions were made by him at the trial (JA 1349).

First, he says there was no "commingling of funds" (Br. 41). The finding is that "The plaintiff has sometimes used and condoned the use of general counsel attorneys on claims litigation" (JA 2659). "Continuously" would be more accurate than "sometimes." The facts show that prior to July 1960, when Joseph McPherson was authorized to work on claims cases, he devoted part or all of 174 days to such cases. (Def. Ex. 4, 9; JA 1223-1229, 1393-1395). Walter Wolf, Jr., devoted part or all of 32 days to claims cases prior to July 1960 (JA 1393-1395). Lawrence Davis devoted all or part of 157 days to work on claims cases (JA 1223-1229, 1393-1395). Richard Brennan and John J. Doherty also devoted work to claims cases (JA 1223-1229, 1393-1395). At plaintiff's direction, these attorneys were paid from tribal funds for such services. They should have been paid from plaintiff's pocket. This was, we submit, the equivalent of commingling tribal funds with plaintiff's own. Put otherwise, plaintiff used tribal money to pay his own bills. Certainly the Tribe did not get all of the services from the general counsel attorneys for which it paid plaintiff or at his direction.

Plaintiff's second answer (Br. 41) that the attorneys on claims work were working for the Tribe, not for plaintiff, does not alter the fact that their compensation for such work was supposed to be paid by plaintiff himself because his contingent fees would cover the fruits of such work. How can the fact that the Tribe would get 90 percent of any contingent recovery warrant disregard of his continuous overcharging of the Tribe?

Plaintiff's third answer (Br. 41) that he was not bound to hire help for claims work is no answer to the fact that the general counsel retainer payments were not to be devoted to claims work.

The fact is clear that, as the district court admitted (JA 2626), there was "diversion of legal assistance." The existence of a possible remedy, i.e., set-off against contingent fee claims, does not alter the fact of overpayment. The adequacy of that remedy is also doubtful,

since it assumes that plaintiff will succeed in some claims case. In addition, it imposes on the client the burden of proving the amount of diversion of funds. In fact, at the present trial, plaintiff's counsel resisted the introduction of exhibits on this question because of alleged inaccuracy (JA 1228). Plaintiff has offered neither restitution, nor even an accounting, if he does assert a contingent fee claim in the future. We deal later (*infra*, p. 16) with the error of plaintiff's assertion (Br. 40) that the Solicitor had suggested that the set-off procedure would adequately protect the Tribe.

3. *Unauthorized increase in plaintiff's compensation.*— This fact is also admitted. Plaintiff accuses us (Br. 39) of "misquotation" when we precisely quoted the proviso of the contract. Compare our Opening Brief, p. 50 with JA 40.⁴ Aside from the erroneous estoppel argument (see *infra*, p. 11), plaintiff has no answer. The fact that Mr. Alexander had also received increases contrary to this provision has no tendency to show that the plaintiff's increase was not breach of contract. Plaintiff makes no attempt to show that it was disclosed, either to the Tribal Council or to the Department, that the \$10,000 increase violated his specific contract. He testified (JA 1365):

Q. You know that no disclosure or explanation was made to the Tribal Council at that time, do you not, that your 1957 contract precluded an increase in compensation for five years, don't you? A. Yes, I do, and it is a matter of some concern to me that that wasn't specifically stated, although it would have made no difference whatsoever.

The Council has the power to change any contract and amend any contract it has.

⁴ If the plaintiff is here relying on the fact that, except for the proviso, the contract provided that increases could be accomplished by inclusion in an approved tribal budget, that does not alter the proviso. And, in fact, Amendment No. 1 of the contract, dated November 15, 1957, provided that after the approval of the amendment "the compensation of the Attorneys for General Counsel Services may not be increased by amendment to the Tribal budget as provided in Section 4a of the Attorney Contract" but only by amendment (JA 52-53).

4. *The Healing v. Jones matter*.—Plaintiff has no answer on the merits of this matter. He does not deny that this portion of Amendment No. 11 was never discussed with either the Advisory Committee or the Tribal Council. He makes no attempt to demonstrate disclosure to the Council that the matter might be arguable. He makes no attempt to show substantial service sufficient to justify a 10 percent contingent payment in defeating a claim of the United States, rather than the Hopi Tribe. Even in the 1957 minutes of the Advisory Committee (not the Council), upon which plaintiff so heavily relies, he said, "If the Government denied completely your rights to the Hopi area" and "I was compelled to sue to get that back from the Government" it would be a claims case (JA 2087). The United States did no such thing. "Throughout the proceedings, after denial of its first defense [the jurisdictional objection],⁵ the Attorney General, represented by the office of the United States Attorney in Phoenix, Arizona has, consistent with its position as stakeholder, assumed the passive role of observer." *Healing v. Jones*, 210 F.Supp. 125, 132 (D. Ariz. 1962).⁶

Even to the Advisory Committee plaintiff gave the clear impression that there was not substantial change from the 1947 contract. He said that the 10 percent contingent fee provision was "identical with the original contract except for the names of the attorneys" (JA 2082). The specification of cases, he said, was for his income tax benefit. The 1947 contract explicitly covered as claims cases "claims of said Indians against the United States" (JA 24). Moreover, as plaintiff told the Committee, the claims provision of the 1947 contract is not limited to 10 years' duration but extends to conclusion of the

⁵ The result of assertion of this defense was a specific adjudication which, under *res judicata* principles, would tend to insulate the judgment against future attack.

⁶ Even if there were any merit to plaintiff's claim that the Government's motion converted *Healing* to a claims case (JA 1375-1376, 1555), it follows that the Government's lack of action after its motion was denied reconverted it to a general counsel case.

litigation (JA 2088). As plaintiff construes it, the 1957 contract was an amendment and enlargement of his 1947 contract. As we have noted, such a contract with a client is presumptively fraudulent and the highest degree of disclosure as to the effect of the change is required (Our Opening Br., pp. 51-52). Even to the Committee there was no such disclosure.

Plaintiff asserts that a single case can be both a "claims case" and a "general counsel" case. This is an assertion of double payment. The two categories are mutually exclusive. A claims case is a contingent fee (plus expenses, of which some \$700,000 has been paid) (Fdg. 74A; JA 2664), while a general counsel case is paid for by the retainer paid monthly. The contract clearly precluded double payment. The 10 percent payment was to be "full and complete payment for legal services for each claim" (JA 41). And the claims were defined as "claims of the said Indians against the United States and officers thereof" (JA 37).

5. *The departmental approval of the amendments to the contract does not immunize the plaintiff from responsibility for his breaches of trust.*—This is one of the main thrusts of plaintiff's brief. Plaintiff is, in effect, arguing an estoppel. This is, we submit, a highly appropriate situation for application of the principle that the United States and government agents are not estopped by omission or mistakes of other agents or themselves, e.g., *Beaver v. United States*, 350 F.2d 4 (C.A. 9, 1965). And certainly an equity court is not thereby required to overlook the breaches of an attorney's contract to the detriment of the client (the Navajo Tribe) which is not before the court.

V

Many Findings Of Fact Are Erroneous Because Of Mistakes Of Law Or Lack Of Support In The Evidence

Plaintiff's responses here demonstrate the misleading nature of many of the findings. Finding 9 is an implied

criticism of the Committee simply because, as had been the custom, it sided with the Chairman who appointed it. Plaintiff does not answer the fallacy of Finding 20 (Br. 49). What Finding 21 has to do with the case does not appear. Finding 55 is a repetition of plaintiff's estoppel argument. And while the materials might have been found in 1961, the implication that they were in fact "before him [the Secretary]" (Br. 51) is denied by the evidence. The Secretary said (JA 1648): "and so I had in November, 1963, a whole set of facts before me that I was not cognizant of in any way in 1961." The "mass of evidence" plaintiff says (Br. 52) supports Finding 58 is simply his own assertions. It is, we submit, contrary to the contract. (See *supra*, p. 11.) Plaintiff's comments on Finding 62 (Br. 52-53) emphasize his intentional diversion of general counsel attorneys to cases he asserted to be claims cases. Finding 72 again confuses availability of facts and actual knowledge of them. Plaintiff simply ignores the differences between his contract and that of his opposing attorney in the Hopi case (Br. 55). Certainly the unsuccessful offer of rebuttal evidence is no admission of relevancy (Br. 56). Plaintiff's defenses of the other findings (Br. 57-66) carry their own refutation. Thus, Finding 113 would have a regulation of the Secretary overrule the term of plaintiff's contract that the compensation for general counsel services "shall be paid for the convenience of all parties in accordance with the payroll practices of The Navajo Tribe" (JA 76). The district court here undertakes to preclude tribal officials from exercising their authority under the Code and this provision of the contract.

PART B

PLAINTIFF'S ADDITIONAL ARGUMENTS DO NOT JUSTIFY AFFIRMANCE OF THE DECREE

I

The Motives Of The Secretary Or The Solicitor Cannot Excuse Plaintiff's Conduct

Plaintiff's brief continues attacks upon the Secretary and the Solicitor which were asserted in the complaint and plaintiff's affidavit in support of the motion for a preliminary injunction (JA 2-21). But, whatever the motivation of the defendant, plaintiff is not, we submit, entitled to the relief which the decree undertakes to give to him. At each point where plaintiff seeks to justify his action, most of his answers relate, not to the facts, but to his charges against the Secretary or the Solicitor. Especially emphasized are the alleged errors in the November memorandum of the Solicitor and alleged changes of position (e.g., Br. 38-40, 41, 42-43). These charges cannot alter the facts as to violation of the contract by plaintiff and his failures to make full disclosure.

Plaintiff is wrong in implying (Br. 7) that this case must rest on the facts known to the Department in November 1963. Certainly "clean hands" refers to the presently known facts and puts no premium on concealment. An attorney whose conduct is called in question would be expected to reply, "My records are an open book." To the contrary, plaintiff goes so far as to complain of the examination of the files of the Legal Department of the Tribe and the introduction in evidence of documents discovered (Br. 6-7).⁷ In view of the congressional purposes as to policing of the activities of attorneys dealing with Indian tribes in the 1872, 1874 the later statutes,

⁷ These exhibits showed the continuous diversion of general counsel attorneys to claims cases. Plaintiff's argument that they are inadmissible because the facts were assembled after November 1963 speaks for itself.

such attorneys would seem to owe the same duty of full disclosure to the Department as they owe to the client, the Tribe.

II

The Charges Of Bad Faith Against The Secretary Are Groundless

Originally plaintiff charged the Secretary with an intention to supplant plaintiff as general counsel with someone of his own selection (JA 6). He said in his press release, after this Court's decision (JA 1972): "His [the Secretary's] purposes were dual: first to capture for political purposes the retainer business of the Navajo Legal Department for his former campaign manager in Arizona, Barry de Rose, and other politically acceptable attorneys in Arizona and New Mexico." This was flatly denied by the Secretary, the Solicitor and others, including de Rose (JA 1238, 1297, 1628, 1630, 1664, 1706, 1787, 1802). No evidence was adduced to support it.⁸ As we have noted (Opening Br. 27), plaintiff also charged the Secretary with malfeasance in connection with *Littell v. Nakai*. That charge evaporated when the Ninth Circuit affirmed and certiorari was denied. Plaintiff now says (Br. 45) that the Secretary acted in bad faith because the Secretary suggested a compromise whereby plaintiff would retain the claims cases and give up the general counsel work. It was the latter which called for personal relations with Chairman Nakai and which involved the present-day affairs of the Tribe. There were valid grounds for distinguishing the two and certainly it is not

⁸ At other times, including, he said, October 1963, plaintiff charged that the Commissioner of Indian Affairs was trying to secure employment of his friend Mr. Richard Schifter (JA 257, 1412, 1518, 1519). He later criticized the Secretary for inaction in not terminating the employment of Mr. Schifter with the Navajo Housing Authority which had been created by resolution of the Tribal Council (JA 1607). Although plaintiff said he had evidence to support his charge against the Commissioner (JA 1609), none was produced.

bad faith to attempt a peaceable settlement of such a situation, rather than acrimonious litigation.

Whether the charges against plaintiff were so plainly groundless as to indicate bad faith, we leave to this Court's decision. How this can be said (Br. 46) in the face of plaintiff's own admission of continuous diversion of general counsel attorneys to claims cases is hard to understand. Plaintiff assails the offer of opportunity to him to rebut the charges as useless and "hypocrisy" (Br. 47), yet in the same breath criticizes the memoranda as being "deceitful" (Br. 46). Yet plaintiff made no reply to the memoranda, and did not answer the specific questions posed by the Solicitor's letter (JA 273-276). Instead, plaintiff filed this suit and made public the Solicitor's November 1 memorandum, which had been confidential for plaintiff's protection (JA 234-240).

We submit that, like the other extravagant charges of bad faith and personal malfeasance leveled against the Secretary, the present charges of bad faith are unsupported. In short, the trial proved the Department's charges and disproved plaintiff's.

III

The Charges Of "Deceitful" Conduct By The Solicitor Are Groundless

Plaintiff's attack on the Solicitor's memoranda is likewise unjustified. The basic charges therein proved to be fact. Most of plaintiff's complaints amount to saying that the Solicitor did not set out the excuses or justifications which plaintiff now urges for his breaches and non-disclosures. We have already shown that there was not a change of opinion as to power of the Secretary to withdraw his approval of the contract (see *supra*, p. 6) nor was there inconsistency between treating *Healing* as a general counsel case and the use of general counsel attorneys on it (*supra*, p. 12). At every juncture, where possible, plaintiff urges his estoppel argument that his actions had been approved (e.g., Br. 38, 42-43).

Plaintiff's implied assertion that the Solicitor erred in saying that plaintiff was obligated to furnish claims attorneys under the contract lacks merit. The Solicitor said, and this was the fact, that plaintiff was obligated "to provide, at his own expense, any other attorneys which are required for claims work" (Br. 41). It ill becomes plaintiff now to tell his client, "I agreed to pay whatever claim attorneys were employed but I didn't promise to provide" other attorneys "required," i.e., needed, for the work. Again, the estoppel theory appears in regard to the Solicitor's October suggestion that the overpayments might be set off against contingent fee claims. This was simply one remedy suggested by the Solicitor, who just before had said (JA 216): "Should the examination and audit of the records disclose the unauthorized diversion of general counsel services, it is our opinion that all remedies available to the tribe should be pursued." This was certainly not saying that offset was the only remedy or, indeed, even an adequate remedy. As the memorandum indicates, an extensive investigation would be required. (It is the result of that investigation that plaintiff insists was inadmissible as evidence.) The presently known facts demonstrate the extreme burden of proof which is thrown upon the claimant of an offset who tries to obtain recoupment. Can an attorney justifiably impose such a burden on his client? Compare the cases cited at pages 49-50 of our opening brief that even restitution or settlement with the client does not exonerate an attorney. This also emphasizes the fact that, as might be expected, a full trial has shown additional or more complete facts that were unknown at the time of the November memoranda.

Without laboring the matter further, we submit that, like his attack upon the good faith of the Secretary, plaintiff's attack on the Solicitor is without warrant.

CONCLUSION

For the foregoing reasons, the judgment appealed from should be reversed.

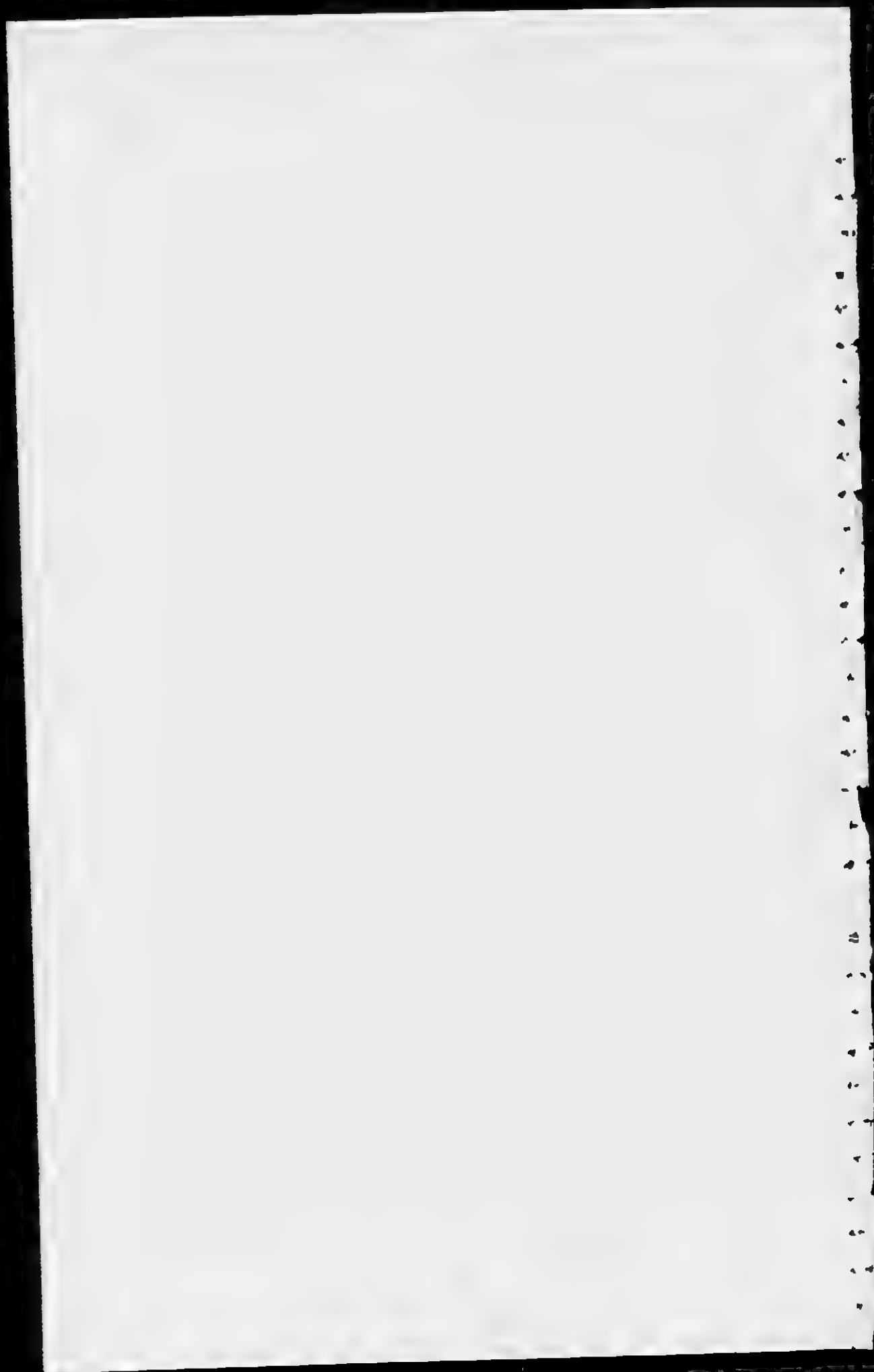
Respectfully submitted,

EDWIN L. WEISL, JR.,
Assistant Attorney General.

ROGER P. MARQUIS,
HERBERT PITTLE,
THOS. L. McKEVITT,

*Attorneys, Department of Justice,
Washington, D. C., 20530*

MARCH 1966



PETITION FOR REHEARING IN BANC

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,725

STEWART L. UDALL, Secretary of the Interior, *Appellant*,

v.

NORMAN M. LITTELL, *Appellee*.

Appeal from the United States District Court for the
District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

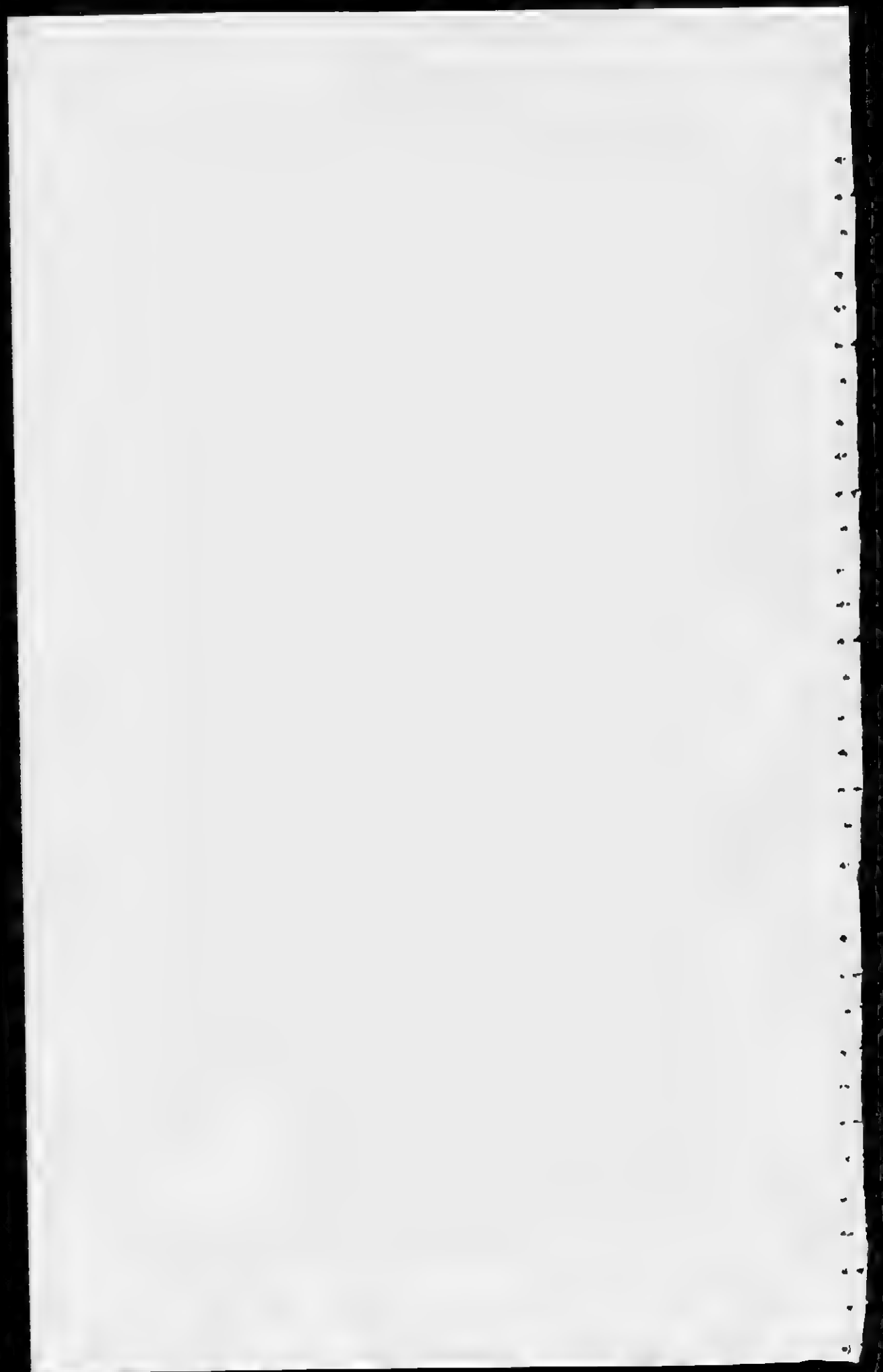
FILED SEP 8 1966

Nathan J. Paulson
CLERK

FREDERICK BERNAYS WIENER,
1750 Pennsylvania Ave., N.W.,
Washington, D. C. 20006,

JOHN F. DOYLE,
206 Southern Building,
Washington, D. C. 20005,

Attorneys for the Appellee.



IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,725

STEWART L. UDALL, Secretary of the Interior, *Appellant*,

v.

NORMAN M. LITTELL, *Appellee*.

Appeal from the United States District Court for the
District of Columbia

PETITION FOR REHEARING IN BANC

NORMAN M. LITTELL, appellee herein, respectfully prays
the Court to grant a rehearing in banc.

First. Inasmuch as the division of this Court that
decided the first appeal in this case held that the Secretary
of the Interior had no power to cancel administratively
an Indian contract once approved by him or by his
predecessors in office, and the differently constituted divi-
sion that decided the present second appeal held precisely

the contrary, it is submitted that orderly judicial administration requires this basic and obviously important issue to be considered by the full Court in banc.

A. On the first appeal (No. 18,338), this Court said (119 U.S. App. D.C. 197,200,202;338 F. 2d 537, 540, 542):

"The Secretary can point to no statute applicable here which confers upon him any such authority.

"We have been shown no basis upon which the Secretary rather than the Tribal Council might declare the contract at an end. We have discovered no source of power—and none has been cited to us—which vests in the Secretary a predicate for rescission by him of his previous approval granted pursuant to 25 U.S.C. § 81 (1958)."

B. Now, however, on the second appeal, on the basis of the precise authorities presented at and rejected on the first appeal (see Sec. Br. and Sec. Rep. Br. in No. 18,338), this court concludes (Op. 11):

"We hold that the broad authority vested by Congress in the Secretary to oversee Indian affairs, particularly in light of the long history of concern over tribal relations with attorneys, includes the power to cancel contracts between a tribe and its attorneys for cause by appropriate administrative action. The Secretary's approval of the contract is no bar to such cancellation for cause."

C. It is not necessary to labor the need for resolution by the full Court of these diametrically opposite conclusions reached by differently constituted divisions of the Court in respect of an obviously important question.

Second. Similarly, there is no need at this juncture to consider at length the statutes involved. The first division found in the generalized provisions of R.S. §§ 441 and 463 no authority for administrative cancellation of approved contracts, and on the second appeal we pointed in addition

to the Act of April 27, 1874, c. 135, 18 Stat. 35, to show that specific statutory authorization was necessary to enable the Secretary to cancel valid Indian contracts executed prior to the effective date of the acts, now 25 U.S.C. § 81, that required secretarial approval as a prerequisite to the validity of such contracts.

With deference, nothing in *Copper Plumbing & Heating Co. v. Campbell*, 110 U.S. App. D.C. 177, 182, 290 F. 2d 368, 373, now relied upon (Op. 9-10), stands for the proposition that, notwithstanding the 1874 Act, the Secretary without it already possessed the power it expressly conferred, so that the statute was actually nugatory. And there is weighty authority strongly to the contrary.

1. In 1953, a Senate committee that castigated particular lawyers' conduct in severe terms never for a moment intimated that the Secretary could administratively terminate the principal offender's contract with the Indians. Quite to the contrary, it recommended action by the Attorney General, i.e., by suit. See p. 24 of Sen. Rep. No. 8, 83d Cong., 1st sess., a document cited at Op. 8, note 13.

2. In the more than ninety years that 25 U.S.C. § 81 has been on the books, no Secretary of the Interior in any case prior to this one had ever before sought to terminate an approved Indian contract (Fdg. 43, R. 2655)—and the action here was taken only after the General Counsel had refused to resign (Fdg. 36, R. 2652). Or, as the district court said (Op., R. 2618), "Thus it appears that the change in attitude by [Solicitor] Barry and the Secretary was not motivated by a recognition of any existing legal power to cancel the contract, but their creation of an assumed power not authorized by law but only motivated by their desire to 'get rid of Littell.' "

3. It seems sufficient to say of the footnoted discussion of 25 U.S.C. § 81a (Op. 10, note 19) that this statute has been consistently read differently by the Interior Department

(Cohen, *Handbook of Federal Indian Law* [1941] 281; U.S. Dept. Int., *Federal Indian Law* [1958] 485-486).

Third. The opinion now sought to be reheard strikes a serious and indeed a lethal blow at Navajo self-government, and this in the face of the Congressional direction (25 U.S.C. § 636) to advance "the development of the Navajo people toward the fullest realization and exercise of the rights, privileges, duties, and responsibilities of American citizenship."

In this connection, it is demonstrably incorrect to speak of "a steadily deteriorating relationship between Appellee and the Tribe" (Op. 14). For the record plainly shows that the only deterioration came in the General Counsel's relations with the newly elected Chairman, and with the latter's Advisory Committee, a body without power in the premises that the Secretary himself characterized as "a stacked body." (Fdgs. 9, 24, 27; R. 2644, 2649, 2650; R. 1656 [Secretary's characterization]). The record further shows that a majority of the Navajo Tribal Council, the Tribe's governing body, has consistently supported the General Counsel and has never at any time sought to terminate the contract (Fdgs. 6, 7; R. 2644).

Indeed, it was the Secretary himself who suggested that the Tribal Council be by-passed (Fdg. 24; R. 2649; Op., R. 2612, 2628), and the district court found as a fact that the Secretary undertook to cancel the contract on his own because of his realization that the Tribal Council would not vote to terminate it (Fdg. 36, R. 2652). Yet under the terms of the secretari ally approved contract, power to terminate was vested in the Tribal Council (Fdg. 5, R. 2643-2644).

More than that, the Chairman, with full assistance from the Secretary's subordinates, was at pains never to let the full Council pass on the issues raised by the Secretary (Fdgs. 85-93, R. 2666-2668). Thus the governing body of the Tribe, which under the contract as written has sole

power to terminate it on behalf of the Tribe, has never to this day had an opportunity to pass judgment on the materiality of the asserted breach of contract on which the second opinion in this case predicates justification for its termination. We agree that "Indian self-government should be a meaningful goal rather than an empty phrase" (R. 2628). It is a goal that would have been reached under the district court's views (R. 2627-2629); it is a goal impossible of attainment under the course of circumventing the Tribal Council that is reflected in this record and that now stands approved in the second opinion.

It is significant in this connection that the Interior Department, speaking of the first statute (Act of March 3, 1871, now contained in 25 U.S.C. § 81) that required approval of Indian contracts by the Secretary and the Commissioner of Indian Affairs, has said (Cohen, *Handbook of Federal Indian Law* [1941] 77; U.S. Dept. Int., *Federal Indian Law* [1958] 114):

"Since many of the grievances of the Indians were grievances against these officers, the Indians were effectually deprived by this statute of one of the most basic rights known to the common law, the right to free choice of counsel for the redress of injuries."

Thus, if the second opinion in this case is permitted to stand, the real losers will be, not the present petitioner for rehearing, but every Indian tribe in the United States.

Fourth. That opinion finds justification for the Secretary's removal of the General Counsel in the finding that (F'dg. 59, R. 2659) the latter "has sometimes used and condoned the use of general counsel attorneys on claims litigation," and dismisses as inadequate the district court's conclusions that (Conc. 11-12, R. 2677) this action did not constitute good cause for cancellation and that an offset will adequately protect the Tribe.

Those were not conclusions subsequently rationalized; to the contrary, it was precisely what the Solicitor had originally recommended to the Secretary, as indeed the opinion now sought to be reheard recognizes (Op. 5; Fdg. 60, R. 2659). At that juncture the Secretary only wished appellee to resign as General Counsel and was perfectly willing for him to remain as Claims Attorney (Fdg. 35, R. 2652). Or, as the District Court said (Op., R. 2622), "A consideration of all the evidence makes it difficult for this Court to conclude that the Secretary really believes Littell to be as reprehensible as he would have the Court believe."

It was only after the General Counsel refused to resign that the set-off solution was abandoned and that the use of general counsel attorneys on claims matters was inflated into grounds for cancellation of the contract (Fdg. 60, R. 2659; see also Fdg. 36, R. 2652).

As a matter of contract law, such breaches as occurred were not sufficiently material to be a ground for terminating the entire contract. 6 Williston, *Contracts* (Jaeger's 3d ed.) §§ 841-843; *Restatement of Contracts*, §§ 274-275; see *Buckner v. Tweed*, 81 U.S. App. D.C. 256, 258, 157 F. 2d 211, 213, certiorari denied, 330 U.S. 825; *LeRoy Dyal Co. v. Allen*, 161 F. 2d 152 (C.A. 4).

Moreover, the district court specifically said (Op., R. 2626), "In fact, circumstances made such diversion unavoidable. There has been no harm done to the Tribe." Since this factual statement, which had ample support in the record (R. 1576-1587), was left unchallenged on appeal, there is no foundation for much of the discussion of fiduciary obligation that is contained in the second opinion.

Significantly, that opinion makes no effort to rest its conclusions on the other charges asserted by the Secretary, all of which the district court found and held to be without foundation (Fdgs. 49-55, R. 2656-2657; Fdgs. 63-75, R. 2660-2664; Conc. 9-10, 13-16, R. 2676-2678). There is

accordingly no need on our part to reargue their groundlessness.

Fifth. The findings, conclusions, and permanent injunction came from an experienced trial judge who presided over two phases of the litigation, a motion to cite for contempt, which was heard for parts of 5 days (R. 441-521, 718-1023; see R. 2690-2691, par. C, for list of proceedings), and a trial on the merits, which lasted two full weeks and produced a massive record (R. 1073-1888, trial transcript; and see list of exhibits summarized at R. 26912692, par. E).

On the basis of every bit of evidence in the case (Fdg. 79, R. 2665), the district court concluded that the General Counsel over a period of seventeen and a half years "has at all times represented his client competently, faithfully, loyally and honestly" (Fdg. 80, R. 2665), and reaffirmed the district court's earlier conclusion that the plaintiff is "a man of outstanding integrity and character" and "an outstanding lawyer" (Fdg. 81, R. 2665-2666).

The district court was further (R. 2627) "of the opinion that the plaintiff, after more than seventeen years of hard work and faithful service in behalf of the Navajos, and after having contributed so much to helping the Tribe advance from a position of poverty to that of great wealth, was entitled to better treatment and consideration by those in a position of authority than he received.

"And the Court can only characterize that treatment, under the facts and circumstances of this case, as brutal and shabby."

Whatever may have been the original "bitter charges and counter charges" between the parties (Op. 14, 15), they were examined and sifted in the course of a lengthy trial, and now stand resolved by the elaborate findings of fact made below, findings that were not disturbed on appeal. The controversy accordingly is no longer one at large.

We submit that, in the light of the carefully detailed findings and opinion of the district court, the opinion of this Court now sought to be reheard leaves a reader of both with the uncomfortable but distinct impression that this Court, while swallowing the camel of the "brutal and shabby" treatment of the General Counsel at the hands of the Secretary and of his subordinates, while also swallowing a second camel of the studied circumvention of the Tribe's governing body—the Navajo Tribal Council—in disregard alike of the terms of the secretarially approved contract and of the Congressional directive for the fullest possible participation of the Navajos in the administration of their affairs, has strained at the gnat of an "unavoidable" diversion of general counsel attorneys in claims matters prosecuted for the benefit of the Tribe, and has on that ground justified the Secretary's termination of the contract in the face of the fact that the Secretary himself did not originally consider such diversion as warranting more than an eventual set-off (Fdg. 60, R. 2659; and see Fdg. 35, R. 2652).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a rehearing in banc should be granted.

FREDERICK BERNAYS WIENER,
1750 Pennsylvania Ave., N.W.,
Washington, D. C. 20006,

JOHN F. DOYLE,
206 Southern Building,
Washington, D. C. 20005,

Attorneys for the Appellee.

Certificate of Counsel

We hereby certify that this petition is presented in good faith and not for the purposes of delay.

FREDERICK BERNAYS WIENER

JOHN F. DOYLE

SEPTEMBER 1966.